# *Panel Forum on Legal Problems in the Atomic Age*

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*Speakers and Members of the Panel in the Order of Their Appearance:*

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PRESIDENT DEMPSEY: If there is any subject that is uppermost in the minds of the people of the country and, no doubt, of the entire world, it is the subject of the atomic bomb and all of its implications.

I think, perhaps, it would be best summarized in the description of the Irishman who was asked to tell the difference between an accident and an explosion. He said, "That is very easy, in an accident there you are but in an explosion, where are you?"

Of course, we multiply that almost to infinity when we consider the implications and complications of the atomic bomb.

The great minds of various countries have been considering diverse phases of the results, militarily and economically, of the atom bomb, so this morning we have arranged a panel of pre-eminent experts who have given a great deal of their time to studies of certain phases of atomic bombs and atomic energy.

To present the panel and to preside as its moderator, we have one of our most active members. He is sometimes referred to as "Mr. Philadelphia" himself.

He was an officer with distinguished service in both World Wars. He is a member of the law firm of La Brum and Doak. He was president of

the Chamber of Commerce of Philadelphia, and is now Chairman of the Board of the Chamber of Commerce of Philadelphia.

He is a brigadier general of the United States Army Reserve, our own very active, very genial member, General J. Harry La Brum, who will preside.

GENERAL LA BRUM: Thank you, Jim.

I think probably I should put Jim Dempsey on the payroll, the Philadelphia payroll, because ever since I have known Jim, he is almost as great a booster as I am for the greatest town in the United States, the city of Brotherly Love.

Today I have the privilege, which comes very seldom to an Army officer, to present to you one of the outstanding officers of the United States Navy.

I asked Admiral Nunn whether or not I should tell this audience how great a man he really is, and he reminded me that one of our members, Billy Porteous, had served with him, and he said, "I am afraid that if you do, Billy may want to make a rebuttal, and I wouldn't want to embarrass either Billy or myself."

However, the Judge Advocate General of the United States Navy has selected for his subject this morning, I am sure, something that is of vital interest to all and great interest to all lawyers.

His subject will be the impact and effect of United States bombing tests in the Pacific on International Law.

It gives me a great deal of pleasure to present to you the Judge Advocate General of the Navy, Admiral Ira H. Nunn.

ADMIRAL NUNN: Mr. Dempsey, General La Brum, and gentlemen. I am very sorry that what I have to say to you is not directly concerned with insurance. I know that is your primary concern.

What I have to say has to do with atomic power.

In the Navy we have a great many legal problems. Perhaps our legal activities extend to all facets of the legal profession.

Of course, voluntarily speaking, our biggest concern is with the administration of the military code, the Uniform Code of Military Procedure, at present that having been preceded by other military codes applicable separately to the Army and the Navy.

There is a story I like to tell illustrative of the care and concern which naval officers of the old school used to feel in taking care of the men under their command.

There was in the old Pacific Fleet a battleship which had its home port at San Pedro, California. On this battleship was an excellent enlisted man of some years' service. He had, in fact, achieved the grade of a Chief Petty Officer.

He was a tower of strength aboard ship, but he had the unhappy faculty of getting into trouble when he went ashore.

On one occasion his ship came into San Pedro harbor and dropped its anchor. The Chief rated liberty and went ashore and, as was his custom, he overstayed his liberty and missed his ship when it sailed from San Pedro.

Eventually he found his way back on board and, of course, was brought before the commanding officer of the ship, the Captain, at mast, for an award of punishment, and the conversation which ensued at mast on that occasion went something like this:

"Well, Chief," said the Captain, "I see that you have once more overstayed your liberty, and you have missed the ship when it sailed. What have you got to say about it?"

"Well, Captain," said the Chief, "you know I am married, my wife lives in Long Beach, near by San Pedro; I have four children, Captain, and when I went home I found that my wife was sick and had been sick for several days without my knowing it. The children were all sick, and there were a great many chores to be done around the house. There were no groceries in the house; there was no one to call the doctor. I did all these things. I cleaned the place up. When I did I was very tired and I turned in. The alarm clock didn't go off the next morning, and I missed the ship when it sailed. When I got to the dock it had gone. I am very sorry, Captain, and I promise you if you excuse me this time it will never happen again."

The Captain said, "Well now, Chief, wait a minute. When I found that you were absent without leave, we still being in San Pedro Harbor, I myself went ashore. I called your wife on the telephone and asked her if she had seen you, and she told me she had seen neither hide nor hair of you, and that she strongly suspected you were drunk somewhere in a waterfront saloon. Now, Chief, what have you got to say about that?"

The Chief replied, "Now, Captain, the two biggest liars in the Navy are standing here facing each other right now. Captain, I ain't got no wife."

Another story I like to tell audiences which comprise military people and civilians has to do with an Admiral in the Navy and a Bishop in the Episcopal Church.

The scene is laid in the maternity ward of a large metropolitan hospital in the husbands' waiting room.

There were two occupants: one was an Admiral in the Navy, and the other was a Bishop in the Episcopal Church, and they were pacing back and forth anxiously awaiting the birth of children.

After a time, the door occupied by the Admiral's wife was opened and a nurse came out and said, "Admiral, you are to be congratulated: you

have just become the father of two fine twin boys. They look just like you. They have your dark hair and your dark eyes. Your wife is doing well. Congratulations."

The Admiral, of course, had his flagship in the vicinity, and he jumped up, started out, and said, "I am going back to my flagship and fire a salute to my two new sons."

But before he could leave the room, the door to the room occupied by the Bishop's wife was opened, and the nurse came out and said to the Bishop, "You are to be congratulated, Bishop. You have just become the father of a fine baby girl. Your wife is doing well. The girl is a beautiful young lady. She doesn't look much like you, Bishop. She does not have your dark hair and your dark eyes. In fact, she has blue eyes and red hair, but she is a beautiful child and you are to be congratulated, Bishop."

The Bishop got up from his chair more slowly, and he said, "I shall go back to my Cathedral and fire a Canon."

Let me say at the outset that the remarks I am to make here do not necessarily reflect the views of the Navy Department, nor the views of anyone else.

However, everything that I am to say and all the facts that I shall discuss have been published and have been publicly documented. There is no restricted material in anything I shall say.

Now, of course, it has been implicit in our technical civilization for many, many years that all advances in science have had their impact upon the law.

An example of what I mean may be found in the recently announced plan to launch an earth orbiting satellite.

Should that be done, I am reminded of the fact that although there is a right of innocent passage through the sea, even through the territorial seas of sovereign states, there is no right of innocent passage through the air space above the territory of any sovereign.

Therefore, we may have, as a fantastic figure of speech, the problem of whether, should the United States launch this satellite to a height of 200 to 300 miles, that satellite will invade the air space above sovereign states other than our own.

Of course, the railroad industry had its impact upon the law; certainly the automobile has; and aircraft have, as well.

At the moment, as you are well aware, I am sure, all of us are having a great deal of trouble by reason of the sonic boom which occurs when high-speed aircraft pierce the sonic barrier. Jet planes equipped with afterburners are giving us a great deal of trouble in the field of noise damage or nuisance due to noise.

But now man has created a more powerful thing. Whereas in the past we have contented ourselves with energy drawn from combustion of the

periphery of the atom, we are now equipped to draw our energy from a fission of the nucleus of the atom. We have created a thing so powerful that many believe it adversely affects the weather. and claims for damage due to that are not beyond the realm of possibility. We have created a thing so dangerous that the disposition of the waste material that occurs in its manufacture and use is a problem as yet unsolved.

Now, this brings me to the principal subject of my remarks. Our first use of this tremendous power has been in an implement of destruction. Our first use of atomic energy has been in its uncontrolled state to create a weapon of war, a bomb.

Unfortunately, this bomb, like most weapons, cannot be intelligently exploited, intelligently built or intelligently used, without test. If we do not test the bomb, we stop improving the bomb. We stop making the bomb.

Therefore, comes the burden of my song. On March 1, 1954, at Eniwetok, in the Marshall Islands, in the trust territory of the Pacific, we tested the first full-scale hydrogen bomb.

Unfortunately, the magnitude of the forces to be released in that test were underestimated by one-half, and this error was compounded by an erroneous prediction of the wind's force and direction.

The zone of warning for this test, therefore, was not made large enough at the inception of the first test. The result was injury to some 28 Americans, and approximately 82 Marshall Islands inhabitants. All were outside the zone of warning. There were 27 Japanese fishermen injured—the crew of a single Japanese fishing boat which, we believe, at the time of the explosion was 14 miles beyond the warning zone.

The damage to the Japanese fishing industry is not clear. Accurate estimates of damage are not substantiated.

However, the United States has paid by way of reparation to the Japanese for their interference with their fishing industry a total of $2 million, and the United States has also taken all means to repair damage done to property and injury to persons.

Following this unfortunate episode, there occurred several attacks upon the legality of our test of the atomic bomb.

These attacks took many forms. There was an assertion that the test was illegal because any use of such a weapon in war would be illegal.

There were assertions that our use of the trust territory for this purpose was in violation of the United Nations Charter, and was in violation of the terms of the trusteeship agreement under which we hold and administer the Pacific Trust Territories.

Those matters I shall pass over, and devote my attention to the third principal argument made against our tests of the hydrogen bomb on the high seas; that our tests violated a clear rule of international law, under

which no nation state, such as ourselves, can exercise sovereignty over the high seas in time of peace.

It was said that freedom of the seas was violated; historical standards of freedom of the states to freedom of navigation, freedom of fisheries, freedom from pollution, freedom of aerial navigation, and those matters had been infringed.

Now, on this point, and on the other matters connected with this, I would like to refer those of you who would like to look carefully into the problem to sources where it is discussed with great clarity and with great ability in all its aspects and n both sides of the case.

There are two excellent articles in Volume 64 of the Yale Law Journal, one beginning on page 629 by Dr. Margolis, in which our test is criticized; and the other by Professor McDougall of Yale, and Mr. Sligh of Yale, which begins on page 648.

Now, here we have the principle of freedom of the seas in issue.

The principle of the freedom of the seas has never been an absolute thing. There have always been instances in which a sovereign power can take a portion of the sea and use it for its own exclusive use, to which it could exclude others, from which it could take such benefit as it might.

In deciding whether a use by a sovereign is authorized under international law, the criterion is whether its use, its proposed use, its actual use, is in fact a reasonable one.

Let us examine briefly those claims for an exclusive use of the sea by a sovereign which international law or custom and tradition have presented. First of all, there is the principle of the territorial sea, the historical three-mile limit.

In this three-mile limit, or in this territorial sea, whatever it has been, there is a bundle of competencies which are described as amounting to sovereignty. It is said that when we establish a territorial sea we actually move our land boundaries that far toward the sea.

We have, in that area of the territorial sea, a right which amounts practically to sovereignty. No other state has any rights in that sea, except, perhaps, the right of innocent passage through it.

Of course, the extent of the territorial sea is in dispute. How wide this belt shall be is in dispute. It varies from the three-mile limit to which the United States and Great Britain subscribe to much larger limits, extending to many hundreds of miles, which other nations claim.

Also, the means of measuring this territorial belt is in dispute. Some would draw lines from headland to headland and measure their territorial seas to seaward of that line.

Others, such as the United States, would require the three-mile limit, to which we subscribe, to be measured from mean low-water mark directly to sea, following the sinuosities of the coast.

In recent years the Court of International Justice has held that Norway's claim to measuring her marginal seas of four miles, as claimed by Norway, from base lines drawn from headland to headland was a reasonable use of the sea.

There the test of reasonableness was applied.

Now, this principle of the territorial sea, this belt in which we have sovereignty, in modern life was not enough.

So we have an additional principle under which sovereigns may make exclusive use of portions of the sea. That is the matter of the contiguous zone.

Sovereigns take for many purposes a limited right to use zones contiguous to their home territory. Examples of that are zones which we have set for customs enforcement. We enforce our customs laws twelve miles at sea, although we claim only three miles as a territorial sea.

Also, there is the principle that a sovereign may claim contiguous zones to an extent which will permit him, if he is a neutral, to remain free from belligerent approaches to his territory.

There is a famous case in which the Confederate cruiser ALABAMA was found by the Federal cruiser during the Civil War while the ALABAMA was in a French port. The Federal cruiser hovered around the three-mile limit waiting to do battle. The range of the guns at that time was more than three miles. The French Navy took the ALABAMA out well beyond the three-mile limit, remaining between the ALABAMA and the Federal cruiser until they had reached a distance safe enough for the fight to occur without any shot possibly reaching the French shore. That procedure by the French has been upheld.

There is also the Declaration of Panama made by all of the American States in 1939 in which they claimed the right for their coast to remain free from belligerent acts, the distances varying from 200 to 600 miles. This was thought necessary during the early stages of World War II.

Many of the States engaged in World War II did not subscribe to this. Nevertheless, it is a recognition that such is a reasonable use of the sea.

More importantly and more recently, the United States has claimed a right to regulate fisheries off its coasts, and of great importance is the United States' claim of the right to develop the natural resources on the Continental Shelves adjacent to our coasts.

There has been little international opposition to these matters.

In these matters where a sovereign is allowed to make use of the sea, there has been a special deference accorded to matters of national security.

Beginning even before the principle of freedom of the seas was announced many years ago, there was accorded the right of nations to put down pirates. From time immemorial all nations were charged with putting down piracy, without regard to the situs of the crime of piracy, with-

out regard to the flag displayed by the pirates, and without regard to the nationality of the pirates.

More recently in the development of these principles has been our problem concerning the treatment accorded claims for national defense purposes.

It was held in the *Virginius* case, for example, that Spain was justified in defending herself by the interception and seizing of a ship of American registry equipped by the United States and manned by British and Americans en route to Cuba, who were in insurrection against Spain.

It was held in the case of the *Caroline* that the Canadians were justified in invading United States soil for the puropse of seizing the Caroline on United States soil, which was being equipped for an attack against Canada, in a case where the United States was unable to prevent the Caroline from making that attack.

In 1907 the British seized the Danish Fleet to prevent its being used by the Russians; and as late as 1940 the British Government seized the French Fleet at Oran to prevent that Fleet from falling into the hands of the Germans.

We have examples of what we may do in this respect by the recent establishment by the United States and Canada of air defense identification zones, in which aircraft approaching our coast are required to report their positions when at certain safe distance from the country.

We are at the present time constructing radar platforms for national defense purposes beyond 150 miles from our coasts on our Continental Shelves.

An exclusive use of the high seas in peacetime has been accorded to sovereigns pretty generally for many years for purposes of military and naval exercises and maneuvers. This is the kind of thing which we did in our atomic bomb tests.

Thus, from the examples I have given, it would appear that the freedom of the seas, even in its most irrational sense proceeds almost completely, as described before, in the need of a sovereign power who is struggling for national existence. Reasonableness is the test.

There arises, then, the problem of whether our test of the hydrogen bomb was indeed reasonable.

There was little interference with commercial navigation by our isolation of the Eniwetok-Bikini area. The nearest steamship line to the area passes 165 miles to the north of the area.

Only one commercial aircraft line had to be deflected, and that was a line between Guam and Wake Island. This line makes the trip two or three times a week and was forced, during the pendency of these tests, to fly a leg 50 miles longer than it would ordinarily do.

The region where we held the test is less commercially useful than any place on earth, with the possible exception of the Antarctic regions, and is used far less than are the Arctic regions. Interference with the Japanese fishing industry was slight.

All of the pre-war Japanese fishing industry from the Japanese Mandates, of which our zone was only a small part, totalled less than one per cent of the entire product of the Japanese fishing industry.

The United States in this matter was not excluding people from this area for the usual reason which gives rise to international claims. The United States was not engaged in isolating this area for the purpose of securing monopolies to its own people, or for the purpose of securing any type of commercial advantage for its own people.

No ships were seized, no property was seized, no civil or criminal jurisdiction was alleged or maintained.

Our claim to use, to test the atomic bomb at sea, was not the type of claim usually associated with national defense matters, even matters of self-defense.

We were not meeting force with force. In our tests of the bomb we were actually only preparing ourselves for our own defense.

There is in the Charter of the United Nations an express acceptation of self-defense, as an exception against the prohibition of the use of violence by member nations.

Even if the United States should be, as a matter of law, liable for the damage it did in testing this bomb, that is no argument and is no decision that the things we did which caused the damage must be discontinued.

Actually, the United States made reparations as quickly as it could and as completely as it could, without allowing a legal determination of whether liability existed.

Claims have been paid, assistance has been rendered, and in everything that has been done, it has been explicitly stated in such settlements that the legal issues are not resolved, and it is very significant that Japan, the injured nation, did not request that these tests of the atomic bomb be discontinued.

Japan was interested in her reparations being made whole for the damage she had suffered, but made no request that the tests be discontinued.

I conclude, therefore, and I submit to you, that the claim of the United States to conduct hydrogen bomb tests is under all contemporary conditions a reasonable assertion which contravenes no prescription or policy of the international law of the sea.

Thank you.

GENERAL LA BRUM: Thank you very much, Admiral. That was a very learned dissertation, and I am sure that I speak for all the members in saying that we enjoyed it thoroughly.

Now, we must lay down some ground rules for the panel discussion which is to follow; the first ground rule is that the views expressed by any member of our panel are not to be construed as representing the views of any agency or company with which our respective panel members may be connected.

The second ground rule is that after these men have completed their opening statements, we will throw the meeting open for questions, but those questions from the floor must be in writing and must be submitted to me, so that I, in turn, may submit them to our panel members, and they can determine whether they will or will not answer the questions.

We have already had submitted to the panel members about nine questions from members of this organization.

I am sure that after they have finished their opening statements there will be other questions. So please remember that they must not come from the floor unless they are in writing, and I hope that, as the opening statements are being made, your minds will be busy conjuring up questions which I am sure you would like to have answered.

I know that this is a rather unusual procedure, but we feel that it will be a more orderly presentation if you will withhold your questions until after the entire panel has spoken.

Our first panel member is a man who deserves a great deal of credit for setting up this panel. Without his assistance, without his help, I am sure we could not have had this panel group here today.

I could say many things about him, but time is of the essence because this is going to be a very interesting panel, and I want you men to get all the benefit that you possibly can from it.

I am going to confine myself to just saying that he is the deputy counsel of the Atomic Energy Commission, and a great New Jerseyite, having been a member of the Constitutional Committee who put in a former member of this organization as Chief Justice of the Supreme Court of New Jersey, Arthur Vanderbilt, and with that I present to you the Honorable Clark C. Vogel.

MR. VOGEL: Thank you, Hap.

Members of the Federation. I was extremely interested, Admiral, in your description of Eniwetok.

About twelve years ago I took a platoon of Marine riflemen ashore there in the early hours of the morning. It was the most beat-up piece of real estate I had ever seen, and with a prophetic vision that I did not think I possessed, I said to somebody, "When we get through with this war, we ought to blow this place up."

The Atomic Energy Act of 1954, which was approved just short of a year ago, has set the framework for the development and growth of a private atomic energy industry. While it continues strict governmental

control in the field, it undermines the government monopoly which existed under the 1946 Act by permitting and encouraging many private activities formerly prohibited.

Subject to licensing regulations, nuclear reactors may now be privately owned and operated, and the Commission is authorized to distribute to licensees the fissionable material to which it has title, which is needed to fuel and sustain the operation of a reactor. A greater latitude in handling classified material is permitted. Former restrictions on atomic energy patents have been relaxed, and a greater scope in dealing with friendly foreign countries and their nationals has been made possible.

Within this framework, American industry over the past year has been very active, and the existence of a competitive market place for atomic energy facilities, equipment and services, both at home and abroad, is now becoming evident.

Equally clear is the direct professional and business interests of the bar and the insurance industry in these developments.

The transition from a statutory monopoly to a regulated industry has created difficult administrative and legal problems for the Commission. I doubt if ever before in the history of our government has a regulatory agency been required to devise and put into operation a scheme of control over an industry which, at the start, was in effect non-existent.

The potential hazards in atomic energy are substantial. The process of nuclear fission which takes place within a reactor creates large amounts of radio-activity contained in wastes known as fission products, highly dangerous to humans, and damaging to many types of material.

It is this radio-activity which creates the major hazard problem. The best calculations of expected blast effects of a run-away reactor show that it would be relatively small. The blast would certainly damage the reactor and its associated equipment, but outside of the reactor building its direct effects would be negligible. In other words, the blast of a runaway reactor has no relation at all to an atomic bomb.

The principal hazards, I repeat, are the fission products which would be released into the atmosphere.

The remarkable safety record compiled by the Commission in over twelve years of operating reactors and handling radioactive substances has resulted from constant concern with the problems of health and safety and reactor safeguards. The new industry must also be prepared to meet the hazard problem, and a primary concern of the regulations which are now being issued by the Commission is with protecting the health and safety of the public and the workers in atomic energy installations.

These regulations will contain the standards and criteria which must be met before the Commission will issue a license to operate a reactor and

handle fissionable material, and should give reasonable assurance that the health and safety of the public will not be endangered.

But there is always the human factor. As one of our leading scientists said recently, "With all the inherent safeguards that can be put into a reactor, there is still no foolproof system. Any system can be defeated by a great enough fool."

And the Commission, in a formal statement to the Joint Committee on Atomic Energy, warned that "inevitably, as more and more reactors are built and used, familiarity will breed some degree of contempt for the dangers. We must expect that at some future time our luck will run out, and an accident may set free radio active contaminants."

This discussion leads inevitably to the subject of insurance. The matter of insurance has become of immediate interest only since the passage of the 1954 Act. For, while the Atomic Energy program was financed wholly from public funds, the government assumed directly all risk of loss. Private industry is now being asked to assume those risks, and private insurers to insure them.

The problem is complicated by the magnitude of possible loss, the legal limits to the size of risk which an individual insurance underwriter can assume, and the lack of actuarial data needed to appraise the probabilities in accordance with the conventional formulae; and, finally, the absence of any definite conclusion by the atomic energy industry itself as to the amount of insurance it needs.

The Commission is vitally concerned with the problem, and is following closely the developments which are taking place; for until this question is solved, it may well act as a deterrent to the fullest possible industrial participation in the atomic energy program.

Some months ago an insurance study group, composed of executives of companies in the insurance industry was appointed to review the insurance problem and to develop information with respect to the insurability of atomic energy installations and undertakings.

The group's interim conclusions contained in a preliminary report recently filed are informative and helpful. Other members of this panel are more qualified than I am to discuss the details of these conclusions.

While a more optimistic picture than was originally expected was presented, it is obvious that considerable study and work are still ahead. After this study group translates their general conclusions into amounts of coverage in dollars, the atomic energy industry must then determine whether it desires a greater coverage than is available on this commercial market. If so, they must support this desire for excess coverage as reasonable and warranted.

Until all the evidence is in, no clear conclusion with respect to government assistance can be stated.

The Commission has no desire to undertake an insurance business, and it will seek authority to do so only if excess coverage can be justified on the basis of a real need, and if the lack of such coverage proves to be an actual deterrent to progress in the atomic energy field.

Several suggestions have been made concerning the form which government assistance should take, if such becomes necessary: the development of a broad scheme similar to that which prevailed with respect to war damage; government re-insurance; direct government excess coverage insurance; and general indemnity legislation which would obligate the government to pay for losses exceeding those commercially insured.

No decision will be made in this regard until, as a first step, the need for government participation is determined. At such time it is hoped that the matter can be worked out through a joint and cooperative effort of the Atomic Energy industry, the insurance industry, and the Commission.

In any event, if the Commission participates in the insurance program, it seems reasonably certain that it will utilize private insurers as agents in servicing the insurance and in the payment and settlement of claims, and it will leave the business just as soon as private insurers can carry the whole load.

Thank you.

GENERAL LA BRUM: The second member of our panel is Hubert W. Yount, who is vice president in charge of underwriting for the Liberty Mutual Insurance Company.

MR. YOUNT: Mr. Chairman and gentlemen of the Federation:

One of the principal purposes of this panel discussion is to review with you some of the problems presented to the insurance industry by the development of atomic energy for peaceful purposes. In order to maintain a workable limit on the time allotted and to avoid duplication, I shall confine myself to a discussion of the general problems presented by the development of nuclear reactors, both for the production of power and for research and experimentation. Mr. Heard is going to discuss with you some of the steps which have been taken by the insurance industry toward a solution of these problems.

Perhaps it might be well to start our discussion by oversimplifying the situation in which we find ourselves:

(1) We have a problem affecting the government, the contractors, the insurance industry, and the general public. This joint problem is not primarily a legal problem but instead a practical problem of coping with the insurance of a new and unusual hazard.

(2) A solution to the problem must be found.

(3) The insurance industry has the will and the ability to solve its part of the problem within the limits of its capacity.

*The Government Problem.* The government has determined our national policy with respect to atomic energy. The Atomic Energy Act of 1954 is the blueprint of this policy. This policy states that the development of atomic energy for peaceful purposes under private enterprise is desirable. It assumes that the initiative and resourcefulness of private enterprise can do the job better than under government monopoly. Implicit is the assumption that the social and economic gains following from such development outweigh possible social losses. Inherent in this public policy is the requirement that the development shall be carried on in such a manner as to protect the health and safety of the public. The legislation provides the means of establishing adequate controls to insure that this will be done.

The health and safety of the public can be protected primarily by the establishment of basic standards of safety applicable to design, location and operation of atomic energy installations. Such standards are being established and they include the two elements of a standard safety program, the prevention and the control of the hazards. However, with the best design and the best safety standards there is always the possibility of a mishap—perhaps of catastrophic proportions. It is at this point that the insurance industry becomes a primary factor in protecting the public against the economic loss from such an event. Without adequate insurance the entire program might be unduly delayed. Some applications for licenses for the construction and operation of reactors under the experimental program have been conditioned on the availability of adequate insurance. The government has a concern because the Atomic Energy Commission is required to make sure that the development will protect the health and safety of the public and they may decide that adequate insurance is a necessary part of such protection.

The enabling legislation has made the Atomic Energy Commission the instrumentality for implementing the general policy. Private enterprise must become sufficiently interested in the problem to be willing to place risk capital in atomic energy installations and without adequate insurance they may be hesitant in making commitments and in applying for licenses. The government is also concerned with the speed with which the program can be developed so that it is evident that insurance has a double-barreled impact on the rate of progress of the program.

*The Contractors' Problem.* The Atomic Energy Act offers incentives to encourage private industry to spend money on the necessary research and experimentation preliminary to the economical use of atomic energy. Hundreds of business firms are interested in getting into the field either in the development of power or in the manufacture of tools, equipment, instruments and parts incidental to the construction and operation of reactors. Because the field is new and experimental, such contractors are in-

terested in protecting their assets to the fullest extent. They are taking the business risk as to whether such operation will be one of possible future profit but they want to have their assets protected both from the standpoint of the physical equipment which might be destroyed as well as the liabilities for damages to persons and property that might result in the event of complete reactor failure.

One of the first inquiries is what insurance will be available and at what cost. This, frequently, must be decided before any of the pertinent details of the proposed operation which affect insurability have been determined. Inasmuch as specific answers to these questions have not been obtained from insurance carriers, contractors have been forced to be somewhat indefinite in their commitments under the program. Again, because the entire field is new and experimental, the insurance industry has not been able to evaluate the hazards sufficiently to come up with precise answers to the questions of their prospective customers.

It is apparent at this juncture that the nature and extent of hazards involved from an insurance standpoint will vary so greatly that each project will have to be evaluated separately, both as to insurability and the conditions applicable thereto, as well as to pricing the coverage required.

*Problem of the Insurance Industry.* The first problem of the insurance industry arises from the nature of the hazard which is peculiar to industrial atomic energy installations. With one exception, the hazards incidental to the operation of a nuclear reactor are to be found in a great variety of industrial operations which are freely insured. It is the exception that gives concern to underwriters and creates the insurance problem for the contractors and for the government.

I refer, of course, to the radiation hazard. For our purpose we need not distinguish between the various kinds of radiation incidental to the operation of reactors. They are all harmful under certain circumstances. While we have known of the hazards from industrial and medicinal radium for many years and have familiarized ourselves with the radiation hazard of radioactive isotopes in more recent years, this knowledge is not of too much assistance to us. Such knowledge as we have has been gained largely under controlled conditions. Our major concern is what would happen under uncontrolled conditions.

Perhaps our greatest problem with respect to the hazard is the area of ignorance surrounding it. In this connection, I refer not merely to the difficulty at getting at known facts under present security regulations—this handicap is being overcome—I refer more specifically to the area of ignorance still to be explored and charted by our scientists and engineers. A good deal of work will have to be done over a good many years before we have a more exact knowledge of the ultimate effect of various types of radiation, of various degrees of intensity on the health and longevity of

persons exposed. This in itself promotes an area of uncertainty for our claims people and our underwriters and forecasts some interesting work for the legal profession.

The area of ignorance on the part of the public concerning these hazards plays an important part in our problem. In the popular mind a nuclear reactor is a potential atomic bomb. The fallacy of this conception has been pointed out by Mr. Vogel. In addition, there are a good many popular fallacies prevailing about the effect of radiation exposure. Since the process of radiation cannot be seen or felt, there is room for the development of a good many psychological claims in addition to actual damage claims in the event of a nuclear event to which numbers of people might be exposed.

From the underwriters standpoint, perhaps the most significant area of ignorance is the engineering area. Nothing in this field is static but instead it is highly experimental. A tremendous amount of knowledge with respect to fuels, reactor design, metallurgy, etc., must be developed. It will be some years before reasonably standardized versions of efficient reactors will be put into general use. In the meantime, the underwriter is called upon to assume a hazard resulting from the use of material and equipment about which even the designer cannot be certain. The underwriter is necessarily concerned not merely with the effects of radiation but under what conditions and from what causes possible radiation damage can occur. The proven safety of equipment and materials and operating procedures is highly important in considering insurability.

This brings us to the problem of controls. The underwriter is concerned not merely with the hazard, its nature and extent, but the extent to which it can be controlled. In the insurance business we deal with very serious hazards with catastrophic possibilities of loss in a great many industrial operations. We take them in stride because we know that the hazards are under control.

Perhaps many fears with respect to the atomic hazard would be allayed if both the insurance industry and the public knew more about extreme measures of control taken to provide against catastrophe. These measures run from basic design of reactors to instrumentation and instrument control, manual control and engineering designs for the containment of fission products in the event of control failure. It has been my observation that the scientists and engineers working in the field have a tremendous respect for the hazard involved and have been and are doing a splendid job in the design of adequate controls.

It is, of course, possible to obtain very effective control against potential loss to the public by locating installations in such inaccessible places that no damage to persons or property can result. Practically, this is not feasible. The factor of location, however, does play a very important part

in minimizing loss should all other controls and containment fail and is an element of determining insurability. Perhaps the most important consideration of the hazard from the underwriters standpoint is the aggregate catastrophe potential. This is the quality of the hazard that presents our greatest collective problem. Our job is to attempt to place such possibility in proper perspective. In order to determine whether a hazard is insurable we need to know the maximum potential loss, the maximum probable loss and about how often the accident will occur.

An analogy can be drawn between our unknown atomic catastrophe and hurricanes. We are becoming entirely too familiar with hurricanes. They are arriving with greater relative frequency. And yet the loss experience for the densely populated area of New England indicates an expectancy of perhaps 400 years for the total destruction of the property values insured. This illustrates the problem of rating catastrophe hazards and incidentally points up another major problem. Since no one can be blamed for the hurricane the cost is spread in small amounts over all property owners who are insured in many companies. If an atomic incident occurs the responsibility rests solely with the owner or operator legally responsible for the loss and upon his insurance carrier. This brings us to the problem of insurance capacity.

The problem of insurance capacity arises first of all from the size of the catastrophe which is possible even though not probable. It is not standard insurance practice today to insure up to the maximum potential loss which might result from an industrial operation. If so, most corporations would buy insurance equivalent to their corporate worth. This is not done simply because of the remote character of such complete loss. The same reasoning should apply to necessary insurance for reactor operations.

However, the insurance problem of capacity on reactor installations is complicated by another factor. Under certain conditions the entire possible loss, both to the property of the owner and to the public, might become a third party liability loss. This would be in the event of negligence on the part of suppliers of parts, equipment, or on the part of the builder. The possible cumulative liability when there is joint negligence on the part of the owner and supplier, or on the part of several sub-contractors also presents a problem in capacity, and further illustrates why the insurance industry has been unable thus far to give firm answers to questions raised by contractors.

Finally, we have a problem in which you are all vitally interested; namely, policy coverage. I do not propose to get into the technicalities of this question. If you agree with my basic premise that the public interest must be protected and that insurance is a part of this protection then the

question of whether this or that policy should or should not cover becomes a matter of internal concern to our industry.

I have been concerned with proposals to deny or to limit coverage. In the last analysis, I regard all radiation damage to the public, persons and property, as falling within the public liability coverage which must be offered. We cannot rely upon possible technical defenses to avoid responsibility for economic loss. The principal question, therefore, is whether adequate limits of liability will be available and will be purchased.

A proposal to limit by legislation the right of persons to recover for personal injuries caused by radiation is dangerous. We ought to be intelligent enough to develop this new industry within the framework of our present economic and legal system and I am confident that we will do it.

GENERAL LA BRUM: The third and final member of our panel is the the first vice president of the Hartford Accident and Indemnity Company, Mr. Manning W. Heard.

MR. HEARD: Mr. Moderator, panel members, and gentlemen:

Mr. Vogel and Mr. Yount have discussed with you the new concept for the development, utilization and control of atomic energy for peaceful purposes envisioned by the Atomic Energy Act of 1954. They have mentioned and discussed some of the questions and problems resulting from the impact of this new concept upon the public, the government, the industry generally, and the casualty and fire insurance segment particularly. I shall attempt to discuss with you briefly and in a general way what the casualty and fire insurance industry has done, is doing, and is thinking about with respect to its role in the picture.

I must make it abundantly clear that any conclusions which have been reached by any committee or committees dealing with the subject matter are on a strictly interim and tentative basis. I must emphasize that no company or group of companies is committed to any plan or program or the details of any plan or program. Therefore I can only cover generally the present thinking on the subject.

It is necessary that I indulge in some repetition in order to put the problems and the suggested solution of those problems into proper focus.

It must be remembered in the first place that insurance company management, broadly speaking, has a most limited knowledge of the exposures involved in privately owned and operated atomic installations. This is because it had been the policy of the government prior to the Atomic Energy Act of 1954 to assume completely all the risks involved in the conduct of this government monopoly. Upon the passage of that Act, however, the insurance companies approached the Atomic Energy Commission in an effort to equip themselves to deal with the problem. Through the sympathetic interest and cooperation of the Commission, an Insurance Study Group of ten senior insurance executives was appointed

and, after the necessary security clearances, that group was given, to the extent possible, the information required to reach some interim conclusions as to the part the insurance industry might play in the development of this great new force in the progress of our country. This Study Group reported to the Atomic Energy Commission that in general the risks involved were insurable, subject to certain conditions and within certain limits.

Furthermore, other committees are at work in the fire and casualty insurance industry, doing the necessary spadework to deal with the mechanics of the insurance market at the actual insuring and policy-issuing levels.

Any consideration of this over-all problem encompasses certain fundamental precepts that no insurance program can ignore. The assets of insurance companies in a very large measure represent funds held in trust for the protection of their millions of policyholders. The management of insurance companies have a duty recognized by statutory mandate to protect the funds entrusted to their care for the protection of the policyholders by limiting the amount of loss which they can sustain in any one catastrophe and by spreading their risks over the broadest base of exposure. Furthermore, the problem of insuring atomic installations and the insurable incidences involved in their construction, installation and operation is made difficult because there are only a comparatively few atomic reactors to be constructed and put in operation in the future just ahead of us, and therefore the spread of risk is, to a large degree, absent. The law of averages will for a long time play little, if any, part in measuring either the premium or the exposure. There is a dearth—and will be for a long time to come—of experience upon which losses can be developed into premium levels through actuarial methods. In other words, when we develop a product to sell, we have a very difficult task in pricing it.

Before discussing tentative plans to make insurance available to industry, it might be of interest to discuss some of the exposures we see in connection with the construction, installation and operation of atomic reactors.

(a) There is no doubt that there is a catastrophic hazard involved. This would result through the release, if all safety measures failed, of fission products of the reactor which are more poisonous by a million times than any other known toxic substance. This hazard, however, is very remote because of the safety controls required and the principle of containment of toxic materials if there should be a reactor incident.

(b) There are also the "run of the mill" operating hazards. These latter hazards are not considered of serious consequence.

(c) A reactor incident might also involve damage to or loss of the reactor itself as well as the containing structure. The value of

the reactor and containing structure, however, is measurable in terms of dollars. The damage to property through contamination in surrounding areas or in the area of fall-out presents a more difficult problem and requires considerable further study.

(d) Liability under Workmen's Compensation Laws with respect to employees engaged in reactor operation is not considered serious but might be of major proportions as such liability relates to workmen in adjoining employments or employments in the area of fall-out.

(e) The main exposure, we think, is the third-party liability claims resulting from an excursion of fission products following a reactor incident. These claims may involve the public generally, workmen in other areas, subrogees of workmen, subrogees of those having sustained property damage or loss, claims against the constructor of the reactor, furnishers of component parts, etc.

Notwithstanding the remote catastrophic hazards involved, it is thought that the casualty and fire insurance industry has a very real obligation to provide coverage and capacity up to the highest limit possible to protect private industry against loss of life or damage to or loss of property resulting from the construction, installation and operation of atomic reactors. It is felt that the limit of insurance available should be equal to if not in excess of the insurance available to the more hazardous industries today.

To the end of mobilizing and marshaling the capacity of the fire and casualty industry to furnish insurance, it would seem, in my opinion, that certain fundamental operating mechanics are involved.

1. Underwriting facilities should be established to provide casualty insurance on the one hand, and fire and allied insurance on the other. Each such facility should develop its own capacity and its own methods of distributing premiums and losses among its participants.
2. All carriers writing the particular lines of insurance involved should be given an opportunity to participate.
3. Each facility should limit the coverage it furnishes to the radiation hazards. This would permit the writing of insurance, excluding the radiation hazards, as it is being written today by individual companies.
4. Each facility should be responsible for:
   (a) the development and recommendation of suitable rating standards for use by rating organizations and members of the facility;
   (b) underwriting decisions on each risk submitted;
   (c) engineering and inspection standards and practices;

(d) claims standards and practices;

(e) liaison with the Atomic Energy Commission.

In addition to the Insurance Study Group appointed by the Atomic Energy Commission, committees of the following organizations have been appointed and are at work in an effort to develop definite plans to provide insurance for the radiation hazards:

Association of Casualty and Surety Companies,

American Mutual Alliance,

National Board of Fire Underwriters,

Factory Insurance Association,

Associated Factory Mutual Fire Insurance Companies,

American Insurance Association, and undoubtedly others.

Within the respective spheres of the stock and mutual fire and casualty insurance industry, membership on these committees has been arranged so that there is the closest liaison among them.

I think it would be appropriate, before I conclude, to say that notwithstanding the competitive relationship existing between mutual and stock companies, there has been the most encouraging and satisfying cooperation among them to the end of finding a solution to this problem which, after all, is good for the economy of our country and in the public interest.

It is my hope and expectation that in the not-too-distant future this subject of insurance of atomic reactors will have been solved to the extent of the ability and capacity of the fire and casualty industry to solve it.

Thank you.

GENERAL LA BRUM: I have here a number of questions which have been handed to me which will be answered by the various members of our panel to whom they are addressed.

The first one is from Al Goldsmith of the Washington Insurance Letter, and it is addressed to Mr. Vogel. The question is:

Should it be determined that some degree of government participation will be required, will that necessitate the repeal of the provisions of the 1954 Act requiring all licensees to hold the government harmless for losses arising out of damage caused by atomic materials?

Will you answer that, Mr. Vogel?

MR. VOGEL: That is a very difficult question. 53(e)(8) is one of the troublesome provisions of the Atomic Energy Act, so far as the insurance picture is concerned.

I think I would answer it by saying, no, that all 53(e)(8) does is relieve the government of liability because it retains title to all of the fissionable material that enters into a reactor.

It may—I do not say it does—it may increase the liability of the operator and owner of the reactor. If that is so, the coverage which the

government insurance or commercial insurance, if it is available, would give would cover that added liability. I do not think it would affect or repeal the section at all.

GENERAL LA BRUM: This is from Mr. Sweet:

Are there any sources of published materials on atomic energy and its use in industry and medicine written in language simple enough to be understood by the layman, not a nuclear physicist, and yet sufficiently comprehensive to give one a reasonably intelligent grasp of the field?

MR. VOGEL: Yes, I would say read the Atomic Energy Act of 1954 as a start.

Until recently there has been very little material prepared for use by a lawyer, but since the 1954 Act the Bureau of National Affairs has come out with an atomic energy service which is very, very helpful.

Commerce Clearing House has an atomic energy service, and the Bureau of National Affairs has also published a small but very compact and comprehensive treatise by two of my former colleagues at the Commission, now practicing law here in Washington, Herbert Marks and George Trowbridge. It is titled "Framework of the Atomic Industry."

I think you will find that a very helpful publication.

In addition, there is a lot of material which has been compiled over the years by the Commission, which is available at the Government Printing Office.

The Commission itself has published a printed bibliography of atomic energy materials. If anyone is interested, drop me a note and I will be glad to send them a copy of the bibliography.

GENERAL LA BRUM: A second question from Mr. Sweet:

Are there any schools or courses designed to educate physicians now practicing medicine in the use of nuclear active materials?

Would any of you insurance men like to answer that question? Mr. Heard?

MR. HEARD: I do not know of any.

GENERAL LA BRUM: Mr. Yount?

MR. YOUNT: I do not know of any school, but that is an interesting question, because as these projects develop it is going to be very important that the medical fraternity in the area be brought into the act.

It is the same problem you have in civilian defense, and the medical work in connection with bomb defense; the treatment of radiation exposure being substantially the same.

I happen to know of one concern involved in this problem at the present time that on its own initiative has gotten the medical fraternity in their area together and has briefed them fully in what is to be done. They have a very fine setup. I think it is one of the best in the country.

But as far as the question itself concerns schools, I do not know of any.

GENERAL LA BRUM: Would you like to say something on that, Mr. Vogel?

MR. VOGEL: Well, the Commission, under contract, sponsors a school at Oak Ridge, called the Oak Ridge Institute of Nuclear Studies, which is devoted to training people in the handling of radio-active isotopes.

Membership in this school is open to anyone who wants to go to it and pay the fee.

I would like to make a point here that radio-active isotopes have a far more extensive use than strictly in medicine; they are very helpful in medicine and medical therapy, but they are also useful in industry generally and in agriculture, and it may well be that in the future the use of radio-active isotopes in a variety of circumstances will turn out to be far more important, as far as the peaceful uses of atomic energy go, than the production of power.

MR. SWEET: I think that answers my question.

GENERAL LA BRUM: This is from Mr. Mawhinney:

The opening statements have dealt largely with the operation of reactors and the hazards in connection therewith.

As I understand it, isotopes or radio-active materials will be used in private business totally apart from reactors. Is the hazard from the use of these isotopes comparable to the hazards presented by reactor operation?

Would you like to answer that, Mr. Heard?

MR. HEARD: The hazards of the handling and use of isotopes are comparable to the hazards involved in the reactor in a very slight degree.

Isotopes have been in use for quite some time in hospitals and in industry, and they are controllable. It is known how to control them. The insurance companies have accepted liability in connection with their use because, as I said, they are subject to control.

In connection with the atomic reactor, however, the problem involved is not the problem of the fission product, but it is a liability involved in uncontrolled fission products. That is the difference between the two.

GENERAL LA BRUM: Would you like to add something to that, Mr. Yount?

MR. YOUNT: I think it has been pretty well covered, but there is an analogy in handling radio-active isotopes with the problems we have had in handling radium over the years.

If an isotope gets lost or destroyed and spread around, you have the problem of air contamination; you have the danger of its getting into the water supply and that sort of thing. That is why the Atomic Energy Commission has set up rather rigid rules for their handling, distribution, storage and use, as I pointed out a while ago.

In no event would the hazard be comparable in degree to that which we are talking about with a reactor itself. But it could be quite a nuisance and would involve quite a little work in clean-up if the isotope should get out of control.

GENERAL LA BRUM: Would you like to add anything to that, Mr. Vogel?

MR. VOGEL: No, I think that the two gentlemen have adequately covered the question.

GENERAL LA BRUM: Now, from Mr. Porteous of New Orleans:

What has been your experience as to the disposition of the AEC to cooperate with the insurance business in meeting the problems presented by the peacetime use of atomic energy?

Mr. Yount, would you like to answer that?

MR. YOUNT: Well, I think that all we can say on that is that the AEC has been very, very helpful; they have thrown all their experts at the disposal of the industry; they have thrown all their information at the disposal of the industry. They have indicated a keen awareness of the problem and a desire to help solve it, and no one has any complaint whatever on the cooperation we have had. It has been wonderful.

GENERAL LA BLUM: Would you like to add something to that, Mr. Heard?

MR. HEARD: Yes, I would. I do not think that there has ever been an instance or incident of cooperation between industry and an instrumentality of the government which has been on a higher and a more sympathetic and cooperative plane than the cooperation exhibited between the Atomic Energy Commission and these companies.

GENERAL LA BRUM: Would you like to blow your horn a little bit, Mr. Vogel?

MR. VOGEL: I will make no comment.

GENERAL LA BRUM: This is from Mr. Luce:

If you are prepared to do so, will you give us an estimate of the date when a nuclear reactor will be in private commercial operation in the United States?

Would either of you gentlemen like to comment on this? Mr. Yount?

MR. YOUNT: I do not think I can add much except to point out that it is going to be a long time before we have very much exposure in this field.

As I said earlier, it is highly experimental, it is slowly developing, and the problem of having a number of installations with a mass exposure is a long way off.

My guess is we will not have very much to worry about from an insurance standpoint before 1960.

GENERAL LA BLUM: Would you like to add something to that, Mr. Vogel?

MR. VOGEL: I would just like to point out to the group that the Commission has an extremely active reactor program going. You probably read in the paper recently, in connection with the Geneva Conference, which is going on at the present time, that the town of Arco in Idaho was lighted by power from an atomic energy reactor for a full hour; and you, perhaps, also read that recently hamburgers were cooked with atomic power in West Milton, New York.

So, much progress has been made.

GENERAL LA BRUM: Mr. Heard, would you like to add something on that?

MR. HEARD: Only this, that what has been said in answer to this question highlights again one of the very difficult problems facing the industry because this very situation precludes the spread of risk which is so necessary in the insurance business to determine both exposures and premiums.

GENERAL LA BRUM: From Mr. Dempsey:

Am I correct in my understanding that AEC regulations as to safety must first be met before a license to operate a reactor, or to handle fissionable material, will be granted?

Will you answer that, Mr. Vogel?

MR. VOGEL: Yes, indeed. Before a reactor can be constructed, the proposed owner must obtain a construction permit. This construction permit will contain many conditions and restrictions directly related to the safety factor.

It will meet the problem of location and design. The Commission will have to approve the design of all privately owned reactors to be constructed, strictly from the health safety standpoint.

When a reactor is constructed, it will be inspected by the Commission's Inspection Division for compliance with the conditions of the permit, and if they are found to have been met, then, and only then, will a license to operate the facility be granted.

In order to obtain the necessary fuel for the reactor, another license, a special nuclear material license, will issue. This will contain the conditions and standards to be met in handling this highly dangerous material. In addition to that, the operators of the reactor, the people who manually operate the controls, are specially licensed on the basis of particular qualifications and training.

There is further a rigid set of health safety standards that have been promulgated by the Commission which the owner of a private reactor will have to follow during the course of the operations, and he will be subject to periodic inspection to see that those regulations are being complied with.

GENERAL LA BRUM: From Mr. Knipmeyer:

How will compliance with AEC regulations be policed after a reactor is in private operation?

Would you like to answer that, Mr. Vogel?

MR. VOGEL: By a special division of the Commission, known as the Inspection Division, which is created by statute and has the power to supervise and inspect all activities of licensees.

GENERAL LA BRUM: Would you like to add something to that, Mr. Yount?

MR. YOUNT: I do not believe so.

GENERAL LA BRUM: You, Mr. Heard?

MR. VOGEL: I would suspect if the insurance companies get into the act, they will do a lot of policing themselves.

MR. HEARD: That is the comment I would like to make, gentlemen. I think that one of the very important features involved in the insurance of these projects has been covered in answer to these last two questions, and I anticipate that in addition to the inspection and engineering that is going to be performed by the personnel of the AEC, that there will probably be some duplication of such inspection and engineering on the part of the personnel of the insurance industry.

GENERAL LA BRUM: Here is the $64 question from John Williams, which the insurance men on this panel will, no doubt, answer:

What is the status of coverage against the radiation hazard under policies outstanding today?

Would you like to start on that, Mr. Yount?

MR. YOUNT: Well, I will start on it.

So far as workmen's compensation policies are concerned, with the employees working in and around the plant, I think there is no question about coverage. The accident and health policies on those installations will also provide coverage.

The primary question, I suppose, is on the physical damage coverages, and that presents a lot of problems that I think the physical damage people are more competent to discuss than I.

I do not believe that we are ready to give answers to these questions yet, but if we start upon the basis that the public is entitled to protection, it is our job to find a way to do that.

I would rather let someone else discuss the other aspects of coverage.

GENERAL LA BRUM: Mr. Heard, will you discuss that?

MR. HEARD: That is a very general question and, of necessity, requires not only a general answer but a somewhat evasive one, too.

I think Hub Yount, in the final analysis is right as respects employees who work in and around a reactor. I feel, however, as respects employers of employees in a fall-out area, that the industry is entitled in the event of

a reactor excursion or an excursion of fission products, to have adjudicated the question as to whether or not that exposure is not an exposure to the public generally and not an exposure arising out of the course of employment.

Now, in connection with the casualty coverages, I think that we pointed out, and I attempted to point out, that the bodily injury and property damage third-party liability coverage is one of the subjects of our study, and the subject of a study of the entire industry at the present time. So far as the fire coverages are concerned, there are problems involved which you can be assured the fire industry will face.

GENERAL LA BRUM: This is addressed to Admiral Nunn from Mr. Callahan:

Is the Navy convinced that atomic propulsion is the answer to the future needs of the Navy in powering its ships?

Admiral Nunn?

ADMIRAL NUNN: That question opens up the most serious problem that the Navy has faced during this generation. None of us in the Navy, now living, witnessed the change in propulsive force from sail to steam. At that time the Navy had a tremendous decision to make, and the Navy has such a decision now.

The problem is not whether atomic propulsion will be the ultimate successful means of propelling ships; it will be, without a doubt.

The question is, how rapidly shall we shift from steam propulsion to atomic propulsion?

We are under a great many pressures in that regard, some of which come from Congress, others coming from different sources.

Actually, the reactors which have been constructed by the Navy for propelling submarines have been startlingly effective. Their progress has been greater than was anticipated.

Now, there are difficulties in building larger reactors. There are those who think we should shift immediately in our carriers, for example, and propel them by atomic energy.

We have, as a practical matter, problems in that connection which I would like to give you because you will see what is involved. If we were to start next year and lay down a carrier for atomic propulsion, and do one each year thereafter, we would have on the ways in construction as yet unlaunched and untested four such large ships, without knowing definitely how they were going to make out.

So the situation that the naval authorities face is a tremendous one and the situation is being given a great deal of attention.

Atomic propulsion of naval vessels is a wonderful thing in ways which, perhaps, have not suggested themselves to you. Those of you who were in the Navy know that one of the principal problems of the task

force was fuel. If any of you have had any experience during operations of the naval task force, particularly during the campaign out there in the Pacific, you would know how wonderful it would be not only to have the carriers or the large ships propelled by atomic energy, but how wonderful it would be to have the smaller ships which have to be refueled every other day.

So we are entering a large field and have some very difficult decisions to make, and we have to make those decisions before we present a shipbuilding program to Congress next year.

GENERAL LA BRUM: This is addressed to Mr. Vogel by Mr. Becker:

Reference is made to the elimination of a government monopoly. Does this mean that the Atomic Energy Commission will gradually go out of business except for its responsibilities in the weapons program?

Mr. Vogel?

MR. VOGEL: The answer is, no. To the extent that there may be policy aspects involved in this question, I am not competent to speak for the Commission.

However, the Commission will continue to function as a regulatory agency exercising control over the industry in the interest of public health and safety. This it is required to do by statute.

Further, the statute itself does not contemplate the elimination of the Commission, but, rather, teamwork between the Commission and industry. To this end, the Commission is directed to continue its large-scale experimental work in developing and perfecting peaceful uses of atomic energy.

There is one further aspect. The industry itself is a very complex thing, and there are many manufacturing and chemical processing steps that take place between converting raw uranium into reactor fuel, and it happens to be the same route much of the way that is travelled in converting uranium into a weapon.

Not all of these steps have a commercial interest, and the Commission must continue in business if we are going to get the fuel for the reactors for peaceful purposes, and the material needed for atomic weapons.

I would say this, however, that the Commission has no desire to compete with private industry in any of the steps where there is an adequate commercial market available. When a commercial market is available in any of the chemical processing or manufacturing steps, I feel safe in predicting that the Commission will step down and abandon the business.

GENERAL LA BRUM: Would you like to comment on that, Mr. Yount?

MR. YOUNT: Well, from an insurance standpoint, I think all of us connected with the industry hope for the maintenance of a strong Commission for the policing and enforcement and determination of regulations

under which this peacetime development is to occur; and I think we all feel that it cannot be successful unless that sort of activity is maintained.

Mr. Vogel points out that is now a mandate of the statute. We would not like to see that changed because we feel that the problem is so technical and has so many ramifications that without such central control our problem will be made extremely difficult.

GENERAL LA BRUM: Mr. Heard, would you like to comment?

MR. HEARD: I think the subject has been very adequately covered.

GENERAL LA BRUM: This is from Tom Foynes:

I have noted with interest that no one has discussed Section 53 (e) (8) of the Atomic Energy Act which provides national licensees shall hold the United States and the Commission harmless from any damage resulting from the use or possession of special nuclear material by the licensee.

Would you like to comment on that, Mr. Vogel?

MR. VOGEL: Well, that is the same section we discussed at the start of the questioning. I will try to answer it as best as I am able.

I assume the intent of 53 (e) (8) was to relieve the government of liability by reason of the fact that it retains title to fissionable material, and I do not think anyone can quarrel with that objective.

However, the language possibly can be interpreted as going beyond this. I have searched the legislative history and I have found nothing very helpful in it. There was no mention made in any of the debates on the Act or in any of the reports on the Act.

It seems to me, and this is purely a personal opinion, that it could be more than a mere negation of liability for a licensee's acts.

If this is so, it raises some very serious questions.

Let us assume, for example, that the government is negligent in manufacturing a fuel element and, as a result of this negligence, there is a reactor accident. Does the section apply? I do not know, and I doubt if anybody will know until the courts decide it.

GENERAL LA BRUM: Have you any comment on that, Mr. Yount? You, Mr. Heard?

MR. HEARD: No.

GENERAL LA BRUM: Here is the $64,000 question by Mr. Risjord:

Does it look like the rule of absolute liability will be applied in the case of a reactor accident?

I would like for Mr. Yount to begin on that.

MR. YOUNT: Well, I am just a practical underwriter, and not a lawyer. I think that we would make better progress to let this new industry develop and evolve within the framework of existing law.

I do not know the answer. I think it would be wrong at this time to suggest any change in our basic legal approach to the problem. I think it ought to fall into the systems in effect in various jurisdictions.

GENERAL LA BRUM: Mr. Heard, would you like to comment?

MR. HEARD: I pass to Mr. Vogel.

GENERAL LA BRUM: Mr. Vogel?

MR. VOGEL: One of the first things you learn in law school is not to give academic opinions unless you have all the facts at hand. This is a serious question. I have read several articles and heard several speeches by eminent legal authority in the tort field proclaiming categorically that the rule of absolute liability will apply.

If I were a plaintiff's lawyer, I would make the same argument. If I were a defense lawyer, I would deny that it applied. Not being either, I can pass.

As I say, this is a very serious legal problem. It is one that you are going to have to face, and it is broader than just the liability of the owner and operator of a reactor. I am sure any plaintiff's lawyer who is worthy of his hire will attempt to extend it to the manufacturers of component parts.

Until there is a real particular fact situation, I think it is not very helpful to go around proclaiming the applicability of absolute liability in this field on the basis of ancient precedent.

I have some serious doubts as to whether you can rely on precedent here, for I know of no precedent. Here is a regulated and inspected industry conducting a licensed activity in accordance with a legislative public policy. The question should be approached on the basis of this unique situation and the social values involved.

GENERAL LA BRUM: That is the last of the questions, but I am going to ask each one of our panel members, beginning with Mr. Heard, to make a closing statement.

MR. HEARD: Well, Mr. Moderator, my closing statement is going to be short and sweet. Thank you very much. I have enjoyed being with you.

GENERAL LA BRUM: And you, Mr. Yount?

MR. YOUNT: I can do no better than to emulate my distinguished confrere from the Citadel of the insurance business, Hartford, Connecticut.

GENERAL LA BRUM: And you, Mr. Vogel?

MR. VOGEL: After my last statement, I follow the precedent set by Messrs. Heard and Yount.

GENERAL LA BRUM: Admiral, I hope you have more courage than the other three.

ADMIRAL NUNN: Mr. Moderator and gentlemen, I have enjoyed this very much, not only the limited participation that I have had, but in the discussions as well.

I realize that the last question could have been discussed here for several weeks. I find the whole thing very interesting.

The Navy had a large stake in atomic development and, as I said before, the success given us by the Atomic Energy Commission in building reactors has been amazing. I am surprised to learn here this morning that reactors adaptable to commercial use will not be available for several years.

The success in submarines has been so amazing that I am sure that every one must realize that it can be done. Perhaps there are costs and other matters in the way.

It is a great field, and a lot of lawyers and a lot of laymen of all kinds, and a lot of military people, too, are going to be making their living out of this atomic concept for many years to come.

Thank you very much.

GENERAL LA BRUM: Thank you, gentlemen.

Admiral, Mr. Yount, Mr. Heard, Mr. Vogel, I want to express to all of you on behalf of all of the members of the Federation of Insurance Counsel our sincere appreciation not only for your coming here this morning, but the great time that you must have put in in order to give us a proper picture of the atomic situation.

And, particularly, the role of insurance in the atomic age.

Thank you very much.

# *Tort Liability in the Atomic Age*

By RALPH E. BECKER *

THE SUBJECT ASSIGNED TO ME for discussion is that of tort liability arising through the industrial use of atomic energy. I shall try to present this from the standpoint of the lawyer who may be called to act as counsel for plaintiff or defendant in these new "atomic" cases.

Uppermost in everyone's mind is the possibility of catastrophe and danger of radiation [1] about which you have heard from previous speakers.

In addition, there will be risks involved in plant construction and installation of machinery and equipment. Building an atomic energy plant is not greatly different from building a power plant or a plant for the manufacture of sulphuric acid, or nitroglycerine. The tools and equipment of the construction men, and their working conditions, will be much the same as usual.

Men will slip and fall, get bruised and burned; they will sprain their backs while lifting or moving equipment, etc.

These and similar accidents will continue after the plant enters the operational stage. Men will be hurt and property will be damaged in all the old familiar ways. The ordinary operating risks will be comparable to those now known to exist in the more hazardous types of chemical operations. These risks are well known to insurers who have successfully coped with them for years.

The difference will come in the radiation hazard. This is the insurer's bugaboo, his big fear. Radiation injury may result from a number of causes: a) defective design and manufacture of the plant; b) defective design and manufacture of machinery and machine components; c) defective design and manufacture of the media for the transportation, distribution and disposal of radioactive materials; and d) the personal equation, i.e., mistake, negligence or insufficient training of the operating personnel. (Any of these may result in injury from radiation, and the problem will then become one for the lawyers and the courts to resolve.[2])

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* Member of the New York and District of Columbia Bars, Ralph E. Becker Law Offices, Washington, D. C.; Secretary-Treasurer of the Federation of Insurance Counsel. Address delivered before the "Briefing Conference on Legal Aspects of Atomic Energy" of the Federal Bar Association, Washington, D. C., September 23, 1955.

[1] William Mitchell, *Some Administrative and Legal Problems Related to the Widespread Use of High Level Radiation Sources*, (Speech), p. 2.

[2] *Ibid.*

What legal principles will be applicable in an action to recover damages for such an injury? Well, first of all, the most basic concept of tort law is that liability must be predicated on fault. Fault springs from intent or negligence. It is obvious that anyone causing intentional harm to persons or property through the use of radioactive materials will be held responsible for his actions. To state the contrary proposition is to demonstrate its patent absurdity.

Liability for negligent conduct should offer no problems of insuperable novelty. We can expect the courts to speak in terms of duty, breach of duty, causation and damages. Courts and lawyers will fumble around for some time in the process of establishing standards of care. Wide differences of opinion will be vigorously expressed on this, and on the quantum of proof necessary to establish the breach of duty and the damages. Proof of damages promises to be especially tricky. But these are all questions of degree. No change should be anticipated in the nature of our long-settled standards with respect to negligence. Nice questions of causation will arise—but then nice questions constantly arise in the field of causation. There will be renewed debate in learned circles of the Bench and Bar concerning what Mr. Justice Cardozo said, and more to the point what he meant, in *Palsgraf* v. *Long Island R. Co.*[3] The classic cases will enjoy a renaissance—In Re Polemis,[4] *Wagner* v. *International R. Co.*,[5] and *Johnson* v. *Kosmos Portland Cement Co.*,[6] will all be examined for new meanings.

Our more scholarly conferes will once again begin their briefs with Bacon's maxim: *"In jure non remota causa, sed proxima, spectatur."*[7] For those of you whose education was never embellished by the language of Caesar and Cicero, Bacon said: "In law the near cause is looked to, not the remote one." There will be frequent references to treaties, and less pretentious works, by Salmond, Jeremiah Smith, Leon Green, Fowler Harper, William Prosser, and other authorities.

Edgerton's intriguing and appealing notion of the "justly attachable cause"[8] will acquire many advocates—especially among plaintiff's counsel. We will watch this with special interest in the District, since Professor Edgerton is now the Chief Judge of our Circuit Court of Appeals.

In sum, there will be much ado about nothing. He who negligently injures another, or another's property, by the use of radioactive substances

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[3] 248 N.Y. 339, 162 N.E. 99 (1928).
[4] (1921) 3 K.B. 560.
[5] 232 N.Y. 176, 133 N.E. 437 (1921).
[6] 64 F. 2d 193 (6th Cir., 1933).
[7] Bacon, *Maxims of the Law*, Reg. I. For English translation see Prosser, *Law of Torts*, (1955), p. 252.
[8] Edgerton, *Legal Cause*, 72 U.Pa.L. Rev. 211, 343.

will be held liable in damages. The course of liability for negligence will follow the old, familiar, predictable lines.

To exhaust the possibilities of negligence liability would go far beyond the compass of this paper. There is a more disturbing question—the possibility of applying the concept of absolute liability to the industrial use of the atomic energy. With your permission I shall devote the remainder of my allotted time to this problem.

Permit me, however, a bit of arrant pedantry! Absolute liability is an inaccurate and, to me, an offensive term. Instances of absolute liability in today's tort law are very infrequent. The Act of God, of the plaintiff himself, or of a third party who could not be anticipated by the defendant are almost invariably good defenses. The liability is absolute only in the sense that it is without fault not in the sense that it attaches at all events. I propose, therefore, to use the more significant term strict liability, which avoids this confusion.

With that small conceit out of the way, let us consider the many facets of strict liability.

Liability without fault has had a spotty history in the development of tort law as we know it today. A rather widely accepted theory has it that the law began by making a man act at his peril, and gradually developed toward the acceptance of moral standards as the basis of liability. There was no steady progress. The law probably swung slowly from "unmoral periods" to periods where more and more stress was laid on moral fault. No period in English law can be definitely isolated and set aside as a time when man acted at his peril with complete responsibility for any harm which might result. Over the years, however, the law increasingly identified tort liability with the immoral conduct which would not be expected of a good citizen. Toward the close of the 19th century this identification had become so pronounced that many noted writers attempted to construct a consistent theory of tort law upon the basic principle that there should be no liability without "fault" involving a large element of personal blame.[9]

Today we are retreating from this position. It is now more or less generally recognized that the "fault" upon which liability may rest is social fault, which does not necessarily coincide with personal immorality. The law finds "fault" in a failure to live up to an ideal standard of conduct which may be beyond the knowledge or capacity of the individual, *and in acts which are normal and usual in the community*, and without moral reproach in its eyes.

It is social fault that a man commits when he brings something upon his land which is dangerous to his neighbors. This is the kind of fault

[9] Prosser, *Law of Torts* (1955), pp. 14-15.

then which may very well be committed by the mere ownership and operation of a nuclear reactor. It is the kind of fault upon which the decision in *Rylands* v. *Fletcher* [10] was based, although this is not clearly shown in the opinions in that case.

*Rylands* v. *Fletcher* came at the height of a "moral" period in the law. The fashion of the times was liability predicated on moral fault. The case was a radical departure from this accepted norm and consequently raised a great furor in England and in this country.

Justice Blackburn, in the Exchequer Chamber, held that ". . . the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, *must keep it at his peril*, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape." [11] This statement is frequently quoted as the "rule" of the case. It is nothing of the sort. The "rule" of a case can only be said to reside in the decision of the highest court to pass on the question at issue. Here, the decision of the Exchequer Chamber was appealed to the House of Lords, and it is to the opinion of that august body that we must look for the "rule."

The House of Lords affirmed the Exchequer Chamber but, at the same time, sharply limited the "rule" announced there, and placed it upon a completely different footing. Lord Cairns stated that the concept of strict liability set out by Justice Blackburn applied only to a "non-natural" use of the defendant's land, as distinguished from "any purpose for which it might in the ordinary course of the enjoyment of land be used." [12] The English courts have consistently applied this interpretation of the Rylands case. Strict liability has been confined to things or activities which are "extraordinary," [13] or "exceptional," [14] or "abnormal," [15] and held not to apply to the "usual and normal." [16]

In the United States *Rylands* v. *Fletcher* was promptly accepted by the courts of Massachusetts [17] and Minnesota.[18] It was just as promptly rejected, and entirely repudiated, by decisions in New Hampshire,[19] New

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[10] Fletcher v. Rylands, 1865, 3 H. & C. 774, 159 Eng. Rep. 737, rev'd, Fletcher v. Rylands, 1866, L.R., 1 Ex. 265, aff'd, Rylands v. Fletcher, 1868, L.R. 4 H.L. 330.

[11] Fletcher v. Rylands, 1866, 1 Ex. 265, 279-280.

[12] Rylands v. Fletcher, 1868, L.R. 3 H. L. 330, 338.

[13] National Tel. Co. v. Baker, (1893) 2 Ch. 186; Noble v. Harrison, (1926) 2 K.B. 332.

[14] Rainham Chemical Works v. Belvedere Fish Guano Co., (1921) 2 A.C. 465, 471.

[15] Barker v. Herbert, (1911) 2 K.B. 633, 645.

[16] Noble v. Harrison, (1926) 2 K.B. 332, 342; Barker v. Herbert, (1911) 2 K.B. 633.

[17] Ball v. Nye, 99 Mass. 582 (1868).

[18] Cahill v. Eastman, 18 Minn. 324 (1871).

[19] Brown v. Collins, 53 N.H. 442 (1873).

York [20] and New Jersey.[21] All three of these cases were obviously cases of natural uses to which the English courts would never have applied the rule.

> "In all three cases the attack was directed at Blackburn's broad statement in the intermediate court, and the final decision of the House of Lords was ignored. Rylands v. Fletcher was treated as holding that the defendant is absolutely liable in all cases whenever anything under his control escapes and does damage. *In other words, the law of the case was misstated, and as misstated rejected on facts to which it had no proper application in the first place.* [22] (Emphasis supplied.)

As of 1955, *Rylands* v. *Fletcher* is rejected by name in ten American jurisdictions.[23] It has been approved by name, or a statement of principle clearly derived from it has been accepted in twenty states.[24] These American cases reflect the limitation to "non-natural use" made by the House of Lords.

The Restatement of Torts has adopted the principle of *Rylands* v. *Fletcher*, but has limited it to an "ultrahazardous activity" of the defendant, defined as one which "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care," and "is not a matter of common usage." [25] This goes beyond the English rule in ignoring the relation of the activity to its surroundings, and falls short of it in the insistence on extreme danger which cannot be eliminated by the exercise of due care. The Restatement's position has not been reflected in the American cases. The Restatement, of course, is not the law. It is perhaps best described as wishful thinking on a scholarly plane.

A careful examination of American case law reveals that even the jurisdictions which reject *Rylands* v. *Fletcher* by name actually have accepted and applied the doctrine under a variety of disguises, e.g., trespass, absolute nuisance.[26] It is safe to say that the principle of the case as defined by the House of Lords now finds wide acceptance in this country.

The owner or operator of a nuclear reactor would obviously find himself in a horrible position under the Restatement rule. The danger of radiation is a risk of harm which cannot be completely eliminated by the exercise of utmost care. *Rylands* v. *Fletcher* offers a little more hope since it can be argued that an atomic energy installation is "natural use" of land in a locale where there is much industrial activity. It will probably be

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[20] Losee v. Buchanan, 51 N.Y. 476 (1873).
[21] Marshall v. Welwood, 38 N.J.L. 339 (1876).
[22] Prosser, supra, N. 9, at pa. 332.
[23] *Ibid.*, at pp. 332-333.
[24] *Ibid.*, at pp. 333-334.
[25] Restatement of Torts, §§ 519, 520.
[26] McAndrews v. Collerd, 42 N.J.L. 189 (1880); Cf. Heig v. Licht, 80 N.Y. 579 (1880), Prosser, *Law of Torts* (1955), p. 252.

some time, however, before our courts are willing to hold that the use of atomic energy is "natural."

Mr. William Prosser, who is not exactly a green hand in the field of torts, has categorically stated:

> "The first case involving damage from the escape of radiation from the use of atomic energy has yet to reach the courts. When it does, it is not difficult to predict that there is no court which will refuse to apply it to the principle of strict liability found in the cases which follow Rylands v. Fletcher." [27]

There is still another legal theory which seems applicable to injuries caused by the operation of a reactor. I call this one the "deep pocket" theory. Professor Morris has stated it this way:

> "One who should know that his activity, *even though carefully prosecuted*, may harm others, should treat this harm as a cost of his activity." [28] (Emphasis supplied.)

This one is a little harder to trace in the cases. It is not so formalized as the others. It is more elusive but its presence can be definitely detected in an ever-increasing number of judicial opinions. The avowed goal of this form of strict liability is the allocation of loss to the party better equipped to pass it on to the public, i.e., the superior risk-bearer. This takes dead aim at the insurance business.

There is still another device which may have the effect of imposing strict liability on the owner or operator of a reactor. This is our old, familiar friend *res ipsa loquitur*. As we all know, *res ipsa* has been expanded in recent years to cover many a situation never dreamed of when the original barrel of flour rolled out of the warehouse window and fell upon a passing pedestrian.[29] If we assume that a plaintiff injured by radiation, which has escaped from a reactor, invokes *res ipsa*, we can immediately conclude that the court will allow the plea. The plaintiff's total inability to prove actual negligence in the operation of the reactor is clearly apparent.

The defendant now has the burden of advancing evidence of non-negligent operation. This could be very difficult—and sometimes it will be impossible. When such an impossibility arises, plaintiff will recover and that result, in the circumstances assumed, is tantamount to strict liability.[30] By this device the courts have succeeded in undermining the old "fault" concept on still another front.

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[27] Prosser, *supra*, N. 9 at p. 336.

[28] Morris, *Hazardous Enterprises and Risk Bearing*, 61 Yale L. J. 1172, 1176 (1951); Morris, *Torts* (1953), p. 247.

[29] Byrne v. Boadle, 1863, 2 H. & C. 722, 159 Eng. Rep. 299.

[30] Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359, 381 (1951).

Quite conclusively, Gentlemen, under one guise or another, strict liability for injuries caused by the escape of radiation will be imposed on the owner or operator of a reactor. There is one consolation. In general, strict liability has been confined to the consequences which lie within the risk created, both as to the type of harm threatened, and the persons within the area of danger. In other words, both the consequences and the plaintiff must be foreseeable to the man of ordinary reason. The decided cases also support the further limitation that liability will not lie in cases where the harm results from the intervention of an unforeseeable force of nature (the Act of God), or the intentional act of a third person.

Contributory negligence is, in general, not a defense to strict liability, but assumption of risk will relieve the defendant. Sometimes, however, assumption of risk and contributory negligence are difficult to distinguish. I refer here to the cases where the contributory negligence consists of voluntary, but unthinking exposure to a known danger, *e.g.*, the boy who crawls under the rope to get nearer the leopard's cage and finds that his confidence in his own agility was misplaced.[31] If these are really cases of contributory negligence, and some courts have so treated them, this type of contributory negligence can be said to be a defense.

It must be remembered also that the legislature may authorize acts which involve a high degree of risk to others, and such authority amounts, at least, to a declaration that the acts are not anti-social, but desirable for the benefit of the community. Thus where gas,[32] water,[33] or electric [34] conduits are laid in the street under legislative sanction, there is no liability for the damage they may do, in the absence of some negligence. A contractor doing work involving blasting for the state has been held not subject to strict liability.[35]

Due to the experimental nature of the industrial atomic energy program and the vast benefits to the community which are anticipated, it would seem that the desirability of legislative protection could be forcefully argued. At least, it bears looking into. The mere fact that the private entrepreneur must be licensed to operate should lend weight to the argument that his activity is not only legal but also desirable and beneficial.

My time is rapidly running out and there is much more that has to be covered. Therefore, I will have to be brief and rely on your questions to develop the points I am forced to gloss over.

I am going to be rather categorical here. The designer and constructor of the reactor, as well as the manufacturer or supplier of the component

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[31] Opelt v. Al. G. Barnes Co., 183 Pac. 241 (Col. 1918).
[32] Gould v. Winona Gas Co., 100 Minn. 258, 261 (1907).
[33] Green v. Chelsea Water Works, 70 L.T. 547 (1894).
[34] National Tel. Co. v. Baker, (1893) 2 Ch. 186, 62 L.J. Ch. 699.
[35] Nelson v. MacKenzie-Hague Co., 192 Minn. 180 (1934).

parts, would all seem to be liable under the conditions and limitations of *MacPherson* v. *Buick Motor Co.*[36] This, of course, is liability based on negligence and plaintiff's case must fail if there is no proof of negligence. A fairly recent application of the MacPherson doctrine indicates that the case is very much alive. I refer to the *Moran*[37] case involving the negligently defective manufacture of a storage tank for liquefied natural gas.

The distributor of radioactive substances or products treated by radiation, *e.g.*, foods, will have to take cognizance of warranties as well as negligence. And remember the warranty may be implied—or expressed, as in the Uniform Sales Act. It is also well to note that in the District of Columbia,[38] and other places, the implied warranty of fitness for human consumption and the corresponding warranty of the Uniform Sales Act are compensated according to the tort rule of damages rather than the contract rule. Warranty is, of course, a form of strict liability.

Vicarious liability should enter your minds also. I can only point out now that agency rules have been relaxed practically everywhere.[39] The courts are prone to find that an agency exists whenever that becomes the only way to reach a financially responsible defendant. It was once the rule that there was no liability for the negligence of an independent contractor. The list of exceptions to that rule has grown so long that it completely obscures the original rule. There is very little safety left in the independent contractor rule.[40]

The Government seems fairly well protected. Under the Federal Tort Claims Act[41] the Government's liability is predicated on negligence. And under Section 53(e)(8) of the Atomic Energy Act of 1954,[42] the Government has absolved itself of responsibility by virtue of retaining title to fissionable materials. And as we all know suing the sovereign is generally a rather futile gesture. In addition, the Supreme Court has held that the Government was relieved of liability by reason of the discretion and policy involved in a fertilizer program.[43] Surely, there is equal discretion involved in atomic energy licensing program for industry.

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[36] 217 N.Y. 382 (1916).

[37] Moran v. Pittsburgh-Des Moines Steel Co., 166 F. 2d 908 (3rd Cir. 1948).

[38] Cushing v. Rodman, 65 App. D.C. 258, 82 F.2d 864 (1935).

[39] Dilli v. Johnson, 107 F.2d 669 (D.C. Cir.): Tarman v. Southard, 205 F.2d 705 (D.C. Cir. 1953).

[40] Rylands v. Fletcher was itself an independent contractor case, as was the Moran case, *supra*, N. 36.

[41] 28 U.S.C.A. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1952 Supp.). The pertinent reference is Section 410(a) of the Act.

[42] See Marks and Trowbridge, *Framework for Atomic Industry*, (BNA Inc. 1955), App. A., p. A-8.

[43] Dalehite v. United States, 346 U.S. 15 (1953).

Three problems remain to be mentioned: a) liability of a governmental body when it assumes corporate form; b) Workmen's Compensation; and c) Statutes of Limitations.

Where a governmental agency assumes corporate form for the purpose of doing business in a field foreign to government and usually reserved for private enterprise, such quasi-governmental unit may well increase its liability. Government corporations engaged in private business, *e.g.*, operating a railroad, have been held liable without regard to their governmental character.[44] This concept would seem to apply to State and municipal corporations as well as the Federal Government. I think we can all see that it is possible that future developments will involve governmental bodies and private entrepreneurs as joint venturers.

My friends in the insurance business tell me that they are not particularly concerned with Workmen's Compensation in the atomic energy field. They have a great deal of experience with this form of liability insurance and feel they can provide adequate coverage with existing facilities. Similarly, from the standpoint of legal liability, I see no great cause for concern. Things should move along much as they always have.

Statutes of Limitations may have to be changed. Radiation injury may not become apparent until many years after exposure. I feel that definite conclusions with respect to changes in tort limitation periods must depend on more complete medical information. Until such information is available, setting up new limitation periods will be sheer guess work.

In sum, Gentlemen, the advent of the Atomic Age will not greatly disturb the principles of tort liability. You can rely with confidence on the principles and precepts you are already so familiar with. The challenge offered by the program is not a challenge to fundamental principles; it is rather a challenge to the skills of the lawyer. Ingenuity, perseverance and ability will be required to adapt tried-and-true methods of presentation and proof to novel *fact* situations. The advocate must sharpen his talents to meet the difficulties which will arise—difficulties which, I apprehend, will be particularly prominent in the areas of causation and evidence. I am confident that the lawyers will welcome this challenge.

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[44] Prosser on Municipal Corporations.

When a municipal corporation performs a service which might as well be provided by a private corporation and particularly when it collects revenue from it, the function is considered a "proprietary" one, as to which there may be liability for the torts of municipal agents within the scope of their employment. This is true where they provide gas (a), electricity (b), etc. (a) City of Richmond v. James, 197 S.E. 416; (b) Bathke v. Traverse City, 13 N.W. 2d 184. "One anomaly is the generally accepted view that the municipality is liable if it can be found to have created or maintained a nuisance even though it be in the course of an otherwise 'governmental' function (c)." (c) Jenkins v. City of El Dorado, 53 P.2d 798; 143 Kan. 206.

# *Procedures in the Organization and Licensing of Insurers*

By CHARLES B. ROBISON*

## INTRODUCTION

THIS ARTICLE IS WRITTEN for the general information of those persons who may be interested in organizing an insurance company or in licensing a presently existing insurance company in other states.[1] At the outset, it is well to remember that insurance companies are governed by separate laws from those regulating other corporations.[2] Insurance companies cannot be organized like "Delaware" business corporations. In most states the organization of an insurance company is provided for exclusively in the insurance laws and under the supervision of the Insurance Departments. A few states, such as Florida and West Virginia, make the general corporation law applicable for the organization of an insurer. Georgia requires the organization to be secured through the Secretary of State. In Connecticut and Rhode Island, insurance companies can be organized only by special act of the Legislature.

The first question to be determined in the organization of an insurance company is, of course, the kind of company that is desired, and the name, which may not be the same as or deceptively similar to the name of any other insurer licensed in the state of incorporation. The organization requirements differ in each state for certain kinds of insurers and whether the corporate structure of the insurer is to be stock, mutual or reciprocal. The state of incorporation is important to determine, but will probably be where the promotors or incorporators reside, because the laws require that at least a majority of the board of directors shall be residents of the state of incorporation, and that the principal office shall be located there.

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[1] For a general discussion of the various legal aspects of organizing and licensing an insurance company, see Patterson, *Formation of Insurance Companies*, (1925) 74 U. of Pa. L. Rev. 20. This article formed part of Chapter III of Professor Patterson's book. *The Insurance Commissioner in the United States* (1927). His writings are valuable and exhaustive reference material, but unfortunately they do not cover the statutory changes and developments in the case law over the last thirty years.

[2] *Robertson v. Missouri State Life Ins. Co.*, 136 S. W. 2d 362 (1940); *People ex rel. Barber v. Hargreaves*, 303 Ill. App. 387, 25 N. E. 2d 416 (1940).

## Type of Insurer

There are three common types of insurers that may be organized under the insurance laws of nearly all states. Those types are stock companies, mutual companies, and reciprocals. A few states permit the organization of a Lloyds association, but for all practical purposes this form of organization can be disregarded in this discussion. A fraternal benefit society may also be formed in any state, but here again the peculiarities of such an organization and the nature of its operations are such that this form of organization will also be disregarded here.

The stock form of corporate organization is the best known and the one most likely to be chosen by a group of entrepreneurs who desire to form an insurance company with expectations for their own pecuniary profit.[3] Corporate stock is issued in much the same way as any stock business corporation is organized. The stockholders are the owners of the business and receive the profits of the business through dividends on their stock. The stockholders control the policies of the business through their power to elect directors annually. The stock corporation offers further advantages to the entrepreneurs by enabling them to have continuing proprietary interest through stock ownership which can be kept in the family more than one generation, and is not extinguished upon death of the initial owner.

The mutual form of corporate organization is quite common, but it is radically different from the stock form.[4] The organizers of a mutual company have no proprietary interest in the corporation. The laws provide that each policyholder shall be a member of the corporation and shall have the right to vote for election of directors, based upon the amount of insurance in force, the number of policies held, or the amount of premium paid, as provided in the by-laws. The only chances of personal gain for the organizers of a mutual company are to become directors and officers of the corporation and receive salaries for their services, or to negotiate a management contract with the company to handle its agency underwriting affairs. The latter method has been used in many instances, and has been one of the prime reasons why some of the largest mutual insurers have flourished and grown to such proportions.

Many of the largest life insurance companies are mutuals. Mutuals are currently enjoying a large share of the casualty business, particularly in the writing of automobile insurance. Mutuals have not grown to such proportions in the fire insurance field, but numerically they are very strong.

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[3] See generally, 18 *Appleman, Ins. L. & P.*, § 10001, et seq.: 1 *Couch on Insurance*, § 241: 29 *Am. Jur., Ins.*, § 45: 44 *C. J. S., Ins.*, § 94, et seq.

[4] See generally, 18 *Appleman, Ins. L. & P.*, § 10041, et seq.: 1 *Couch on Insurance*, § 234-240, 250: 29 *Am. Jur., Ins.*, § 52: 44 *C. J. S., Ins.*, § 104, et seq.

Throughout the country one can find a local county mutual fire insurer almost anywhere he would care to look. Many such local mutuals limit their field of operations to one or more counties, or at most to one state.

Mutuals in the past have frequently been organized by a group of similarly situated individuals with common insurance risks for the purpose of providing insurance for themselves at less cost than they could purchase such insurance from existing companies. This is still a dominant reason why the mutual form of organization may be preferred in such a situation over the stock corporation.

Similarly, the reciprocal form of organization provides a means whereby a group of persons can in a sense insure each other at cost. A reciprocal is a legal entity known as an inter-insurance exchange.[5] It is purely a creature of statute and is not a corporation in the commonly accepted sense of the term, nor is it a corporation in a strict legal sense. Some state insurance laws for a long time didn't provide for the organization of a reciprocal, and at least two states held that in the absence of such a statute, a duly organized and operating foreign reciprocal of another state could not be licensed in those states.[6]

A reciprocal or inter-insurance exchange is a system of insurance under which several individuals, partnerships or corporations underwrite each other's risks through an attorney-in-fact, under an agreement that each underwriter acts separately and severally and not jointly with any other underwriter. The association has no stock, declares no dividends and does not operate for profit. The reciprocal contracts "exchanged" among the subscribers through the attorney-in-fact are in essence the insurance contract.[7]

The reciprocal form is not used very often now in the organization of new insurers, but there are several large and respected reciprocals operating in the fire and casualty field. This form cannot be used for life, health, or accident insurance. The reciprocal form may be considered when the initial group of individuals are content to turn over the management of the organization to an attorney-in-fact, who in effect operates as an insurance company. In most instances the impetus for such type of organization is likely to come from the individual or persons who desire to act

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[5] See generally, 19 *Appleman, Ins. L. & P.*, § 10121, et seq.; 1 *Couch on Insurance*, § 33; Id., 1 Suppl., § 243-2; 29 *Am. Jur., Ins.*, § 16-20; 46 *C. J. S., Ins.*, § 1410, 1412-1418; 1 *Richards on Insurance*, (5th ed.), §37.

[6] *Farmer's Auto Ins. Exch. v. MacDonald*, 59 Wyo. 352, 140 P. 2d 905 (1943) (California reciprocal insurer could not be licensed in Wyoming even though it possessed funds equal to the capital requirements for like insurance corporation). To the same effect, see *Intermountain Lloyds v. Diefendorf*, 51 Idaho 304, 5 P. 2d 730 (1931).

[7] *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 63 S. Ct. 602, 87 L. Ed. 777, 145 A. L. R. 1113 (1943); *Re International Re-Ins. Corp.*, 29 Del. Ch. 34, 78 A. 2d 774, *aff'd*, 32 Del. Ch. 471, 86 A. 2d 647 (1952); *Farmer's Auto Ins. Exch. v. MacDonald*, 59 Wyo. 352, 140 P. 2d 905 (1943).

as the attorney-in-fact and to have active control of the management of the insurance enterprise.

Presumably an insurer could be organized to transact a reinsurance business exclusively, though the statutes are vague on this point. As a practical matter, an insurer would probably want both primary and reinsurance powers in its articles of incorporation.[8]

The reorganization of an existing insurer is sometimes desired by management. A common procedure in the past has been the mutualization of a stock insurer, particularly in the life insurance business. An outstanding example of such a change was the mutualization of the Prudential Insurance Company of America which extended over a period of years and culminated in 1943. Fraternal societies are sometimes converted into mutual insurers.

A not so common and more complicated procedure is the changing of a mutual fire or casualty insurer into a stock company. This may be accomplished in some jurisdictions provided adequate safeguards are established for the protection of the mutual policyholders. Usually management forms a stock company and reinsures all the mutual business in the new company through the establishment of a highly technical mutual policyholders' trust fund, administered by the stock company. The stock company acts as a trustee of the mutual business until all the mutual policyholders have lapsed out or converted their policies to the stock company, meanwhile receiving their proportionate shares of the surplus and earnings of the fund.

## Kinds of Insurance

The kinds of insurance for which a company may be organized to write are varied. The laws of many states have specific statutory definitions of the several classes and kinds of insurance. There are three classes of insurance: Life, fire and marine, and casualty.

Within the first class is included accident and health insurance, and disability and double indemnity contracts issued in connection with life insurance. Annuities and endowment contracts are also covered under life insurance. A new innovation currently causing much controversy is the variable annuity contract. One company has recently been organized to write this type of contract, but legislation may be required in several states before such contracts may be written. A few states had such bills in the last legislative sessions, but none was passed.

The second class comprises fire and marine insurance. Within this class are several kinds of insurance covering risks against damage to prop-

[8] For a treatment of the subject, see *Thompson, Reinsurance* (2d ed. 1949).

erty. This includes the risks of fire and other perils normally specified in the standard fire insurance policy and extended coverage endorsement, sprinkler leakage, water damage, war, riot and explosion, marine and transportation, and all forms of vehicle insurance other than liability coverages.

The third class includes all casualty lines and is generally differentiated from the fire classification by the nature of such insurance covering the legal liability of the insured to third parties. This includes all forms of liability insurance, workmen's compensation, and employers liability, also, full coverage automobile, burglary, theft, fidelity and surety, glass, etc. Accident and health insurance may also be written under casualty.

There is considerable overlapping between the casualty lines and fire lines. Nevertheless, until the passage of multiple line laws, an insurer licensed to transact business in one class could not be licensed to write the kinds of insurance in the other class. Now all states have multiple line laws permitting an insurer to be licensed to write any or all of the kinds of insurance in both the fire and casualty classifications. Life insurance must still be written by a separate insurer and cannot be combined with any other kind or class of insurance, except accident and health.

## Organization Details

Having determined the type of insurance company to be organized, the kinds of insurance to be transacted, and the state in which the organization is to be effected, the specific laws of that state must be consulted in order to comply with the detailed statutory organization requirements. The comments in this article will be generally applicable to whatever type and kind of insurance company it is desired to organize. The basic prerequisite is the amount of capital required.[9] This capital may be raised in two ways—First: A group of individuals may already have the cash or securities or have it within their power to borrow the sufficient capital. Second: The capital may be raised by public solicitation of stock in the insurance company, if it is to be a stock insurer, or for guaranty capital if a mutual insurer, or in some states, the capital may be raised by general public solicitation for insurance in the company, if a mutual or reciprocal insurer.

Hardly any state will permit any type of insurer to be organized for less than $100,000 of capital. In Texas prior to the enactment of new laws in 1955, is was possible to organize a limited life insurer for as little

[9] For a digest of the capital requirements of the several states, territories, and Canadian Provinces for fire and casualty companies, see the annual compilation book, The Spectator, *Insurance Laws, Taxes and Fees*. Other organization and admission requirements are also digested in this compilation and in McCombs and Company, *Insurance Law Index Service*.

as $25,000. Colorado presently permits the organization of a fire or casualty insurer, to write business in Colorado only, for $75,000 total capital and surplus. Most states, however, require capital of $200,000 and surplus of $100,000 for a fire or casualty insurer, and additional capital, depending upon the different kind or kinds of insurance to be written. Multiple line insurers of all fire and casualty risks must generally have capital of at least $500,000, and in a few states the capital requirements are $1,000,000 or more.[10]

It is necessary that formal articles of incorporation be prepared which contain the usual items, such as the corporate name, the location of the principal office of the company, the kinds of insurance that the company proposes to write, the amount of capital, and the number of members on the board of directors. In setting forth in the articles the kinds of insurance, it is preferable to make a specific reference to the sections of the statute of the particular state under which the authority to write business is sought, rather than to spell out in detail the statutory definition of those particular kinds of insurance. In this way the articles of incorporation will not have to be amended each time there is a statutory change in the definition of the particular kind or kinds of insurance for which the insurer is licensed to write.

By-laws for the corporation must also be prepared and these will follow generally the form of by-laws that are used in the organization of business corporations, reciting the details for the administration of the corporate procedures by the officers and board of directors.

The statutes generally require that the articles of incorporation and by-laws, together with a form of subscription agreement, or in the case of a mutual company, the application for membership and the form of insurance policy to be used by the company shall be delivered to the Insurance Commissioner for his approval. In some states an organization bond is required, and newspaper publication of intention to incorporate is also required in other states.

Upon the approval of the articles of incorporation by the Insurance Commissioner, the corporate existence of the insurer begins, but there are still other steps necessary before the company is permitted to sell insurance. The company has the authority, after approval of its articles, to solicit subscriptions to its capital account, but it cannot apply for a certificate of authority to do an insurance business until its necessary capital is fully paid in. In some states it is required that the minimum capital be deposited with the Insurance Commissioner, but not in excess of a certain sum, usually $100,000 or $200,000.

In the solicitation of capital, the Federal Securities Act must be observed if there is to be an offering in more than one state. If the offering

[10] California, Indiana, Massachusetts, Michigan, New York, and Pennsylvania.

is in only one state, the Securities Act of that state must be observed. In the instance where the incorporators and a few other persons put up all the capital, the offering will come within an exempt transaction under the state Blue Sky Law and there need be no registration of the securities. Once the corporation is licensed to do business, no securities can be issued to the public without compliance with the applicable state Securities law, and the Federal law.

During the interim between the issuance of the certificate of incorporation and the payments into the capital account, the incorporators act as directors of the corporation. They have already prepared and filed a set of by-laws for the corporation, and they are further authorized to solicit and collect capital. Incorporators are personally liable to the subscribers in event of their failure to complete the organization of the company and to secure its certificate of authority to do an insurance business.[11]

The subscription agreement should contain provisions for depositing in trust the payments for shares, and for the return of such payments if the organization of the company is not completed. Subscriptions should be made irrevocable unless consented to by the subscribers to a majority of the total amount subscribed. In some states provisions to be contained in the subscription agreement are prescribed by statute.

The capital for a mutual company or a reciprocal may also be solicited upon a subscription agreement, but the subscribers do not become stockholders. Instead, they are in the nature of creditors of the corporation, the indebtedness being evidenced by a guaranty fund or guaranty capital certificate. Such certificates bear interest and may be retired when the surplus funds of the insurer are sufficient. Thus, the initial guaranty fund or guaranty capital certificates of a mutual or reciprocal insurer are somewhat similar to callable bonds of any stock business corporation, but without any specified maturity date.

In some states mutuals or reciprocals can secure their initial funds through the solicitation of insurance on a certain specified minimum number of separate risks aggregating a certain specified amount of insurance, on which the premiums have been paid in cash.

When all the capital has been subscribed and paid, the incorporators call a meeting of the subscribers for the election of directors, approval of the by-laws previously filed, and for other routine business usually transacted at the first meeting of shareholders of a newly organized corporation. Similarly, the elected directors in turn elect the officers and take such other action as may be necessary to secure the actual certificate of authority. Some of these duties may be delegated to the officers.

When an insurer has made the deposit of its minimum capital, it then submits itself to an examination by the Insurance Commissioner so that

[11] *Alderman v. Thimgan*, 76 Colo. 268, 230 Pac. 620 (1924).

he may determine whether the company has complied with all of the organization requirements of the statute. If he finds that the company has thus complied, a certificate of authority will then be issued by him, granting to the company the right to transact an insurance business for the ensuing license year. The statutes of most states make issuance of a license mandatory upon the commissioner when all of the preliminary conditions have been satisfied, and the commissioner cannot refuse to grant the license for other reasons.[12]

Before a certificate of authority has been granted, however, the company will usually be required to designate the Insurance Commissioner as its attorney for service of process and, of course, the forms of policies to be used by the company and the rates for such insurance must be filed if the particular kind of insurance for which the insurer is organized is subject to rate regulation. Under the rating laws of most states an insurer may file its own rates, or it may join a rating organization which makes rates for such kinds of insurance and designate such rating organization as its agent for the purposes of filing rates for the insurer. In such event the insurer will file with the Insurance Commissioner a statement that it will abide by the rates of such rating organization filed on its behalf. As a practical matter, since a new insurer has no experience of its own on which to make rates, it will probably initially adopt the rates of a rating organization unless it can demonstrate to the Insurance Commissioner that from the very beginning of its existence it has either a different expense or underwriting factor which would justify approval of a rate lower than the Bureau rate for such risk.

## Licensing of an Insurer in Other States

The incorporators of a new insurance company may desire to license the company in other states almost simultaneously with the organization of the company in its home state. However, they will find that this is

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[12] *Dakota Nat'l Ins. Co. v. Comm'r*, ..... N. D. ....., 54 N. W. 2d 745 (1952) (fact that director of new company was involved as officer of another solvent company was not sufficient ground to refuse license); *In re Union Hospital Service Ass'n*, 75 Ohio App. 394, 62 N. E. 2d 265 (1945) (license could not be withheld because incorporators had not become directors of member hospitals); *Elmer v. Comm'r*, 304 Mass. 194, 23 N. E. 2d 95 (1939) (commissioner could not refuse license because of moral character of directors of new company).

In view of the current failures of insurance companies in Texas and the announced intention of the Texas Board of Insurance Commissioners to investigate all Texas companies, it is interesting to note that Article 2.01 of the Texas Insurance Code, as amended in 1955, provides that before licensing a new insurer the Board shall determine whether or not: "The proposed officers and directors, attorney in fact or managing head have sufficient insurance experience, ability, standing and good record to render success of the proposed insurance company probable."

practically an impossibility. Many states will not license a foreign insurer from another state that has no record of experience and which has not been in business for a certain minimum length of time. The rule is not often found in the statutes, but some insurance departments require that an insurer must have been actively engaged in the writing of insurance for a period of at least one year before its application for a license will be considered (such as New York). In some states this initial period is two years (such as Wisconsin), and in other states three years (such as New Hampshire). A Tennessee law provides that if the insurer is less than five years old, it must have surplus equal to fifty per cent of the initial capital requirements. A foreign mutual fire insurer may not be licensed in New York unless it has transacted business continuously for five years.

Assuming that the insurer has been in existence for the minimum period of time required for seeking admission in a particular state, it will find that such license does not come automatically with the filing of the necessary documents that are set forth in the statute.

In the first place, many states will not forward the various forms upon request but will require that the company first submit its convention form of annual statement for the preceding year, or its last report of examination, so that the insurance department of the particular state can satisfy itself as to whether the insurer is a fit subject to be licensed. It is at this point that an insurer may find that it cannot become licensed in the particular state unless its annual statement shows a proper ratio of surplus to volume of business, or unless it can meet other requirements laid down by the insurance department. The company will not be given the opportunity to complete its application to do business in the state unless these preliminary requirements are met.

If, however, the insurance department of the state is satisfied with the financial status of the insurer seeking admission, it will then forward its application forms and blanks to be completed and returned. These forms include a certified copy of its articles of incorporation, all amendments thereto, a copy of its by-laws, a power of attorney to the Insurance Commissioner authorizing service of process upon him on behalf of the company, a certified copy of its last report of examination, a certificate of deposit showing that it has on deposit in the home state or some other state the minimum deposits required by the state in which the insurer is seeking to be licensed, a certified copy of the certificate of compliance from the insurance department of the home state showing that the insurer has a current certificate of authority and is operating in compliance with the insurance laws of the home state. A few states require designation of an agent for process other than the insurance commissioner. If the company conducts its business through agents, the name of the general agent in the state must be furnished.

The report of examination is a very important document and it must be fairly recent in point of time from the date of the application in order to be acceptable. At the most, it cannot be more than three years old, and some states insist that it be not less than one year from the date of the application for admission. One or two states have even insisted that the examination shall have been completed within six months prior to the application for admission.

Some states have other special requirements. Arizona and other states require a certificate that the company will accept and abide by the laws of that state. Maryland requires a list of the officers and directors of the company, together with a brief biographical sketch of each. Nebraska requires the submission of a schedule showing the salaries paid to the officers of the company in the preceding year.

If all of these documents which are required to be filed with the application for admission into another state are in order and satisfy the Insurance Commissioner, he will, after due deliberation, generally issue a certificate of authority for the insurer to do business in that state for the ensuing license year upon payment of the proper license fees. It has generally been held that when all the requirements of the law have been met, an insurer is entitled to a license and the insurance commissioner must issue the certificate of authority.[13]

However, it is too much to expect in the usual course of events that this license will be issued with an reasonable degree of swiftness. A few insurance departments are reluctant to license companies from other states and in some states there may be a delay of several months before the license is issued. However, it should be said in defense of the insurance department that in many cases the delays are justifiable because of the volume of business handled by the usually understaffed department. Also, if a commissioner knowingly grants a license to an insurer which has not in fact complied with the statute, the commissioner may be held liable on his official bond for loss occasioned thereby.[14]

Either before or immediately after the issuance of the certificate of authority or license, the insurer will be required to submit in duplicate copies of its various forms of insurance policies that it proposes to use in the state and also its rates that it proposes to use. Here again, the insurer may designate a rating organization to make the filing of its rates on its behalf, and if this latter procedure is used, the particular rating organization has forms for completion by the insurance company designating to the Insurance Commissioner that the rating organization is to make the filing of rates for the insurer. No trouble will be encountered in this pro-

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[13] *Bankers Life & Cas. Co. v. Cravey*, 208 Ga. 682, 69 S. E. 2d 87 (1952); *Fidelity Life Ann's v. Hobbs*, 161 Kan. 163, 166 P. 2d 1001 (1946).

[14] *Bankhead v. Howe*, 56 Ariz. 257, 107 P. 2d 198, 131 A. L. R. 269 (1940).

cedure. However, if the company seeks to file its own rates, it will have the problem of justifying those rates to the satisfaction of the Insurance Commissioner as provided in the rating laws of the particular state. Some states require all insurers to belong to a local rating organization, usually only for fire and allied lines, but automobile insurance is also included in North Carolina and Virginia.

Companies writing automobile insurance will have to file a designation subscribing to the assigned risk plan in the state. Casualty insurers will also have to designate the statistical organization to which they will report their experience in the state.

A number of states require a deposit of cash or securities with the state treasurer or insurance commissioner to protect the policyholders of that particular state. These deposits are in addition to any deposits the company may have in its home state or elsewhere. They range from a minimum of $10,000 to $50,000 depending on the state and kinds of insurance the company writes. Such deposit requirements are valid and are a prerequisite to the granting of a license to the foreign insurer to do business in the state.[15]

The retaliatory law of the licensing state frequently is applied to a foreign insurer, because the fees and taxes of the home state may be higher than those of the state in which the license is sought. In such case the fees of the home state will be assessed against the insurer.[16]

## Annual Renewal of License

Once a company has been granted a certificate of authority for a current license year, the certificate must be renewed each license year thereafter. This is ordinarily accomplished by the payment of the nominal renewal fees, accompanied by a current Certificate of Compliance and Certificate of Deposit from the home state. Of course, the annual premium tax and other taxes must be paid to the state before a license will be renewed.

The laws give the insurance commissioner authority to revoke or to refuse to renew a license for specified causes, but he cannot revoke or refuse a license of an insurer for causes not specified in the statute.[17] It was held in Ohio that the Superintendent of Insurance could properly refuse to renew a license of a domestic mutual insurer which paid its general manager

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[15] See 19 *Appleman, Ins. L. & P.*, § 10487.

[16] The New York Insurance Department publishes an annual booklet, *Fees and Taxes Charged Insurance Companies*, which is a compilation covering all states.

[17] *State ex rel. Rice v. Hartman*, 179 Miss. 634, 176 So. 529 (1937); *Fireman's Ins. Co. v. King*, 54 F. 2d 941 (D.C.S.C. 1929); *Bankers Life & Cas. Co. v. Cravey*, *supra*, note 13.

exhorbitant compensation.[18] So long as an insurer complies with the laws of a given state in which it is licensed and remains solvent, the renewal of its license will be perfunctory. It is also well to remember that an insurer is periodically, usually every three years, subjected to a thorough examination by the insurance department of its state of incorporation if licensed only in the one state, or by a zone examination of the National Association of Insurance Commissioners if the insurer is licensed in several states.

[18] *State ex rel. National Mut. Ins. Co. v. Conn*, 117 Ohio St. 190, 157 N. E. 563 (1927); also, *Caminetti v. State Mut. Life Ins. Co.*, 52 Cal. App. 2d 321, 126 P. 2d 165 (1942) (holding commissioner had power to put company into receivership when exhorbitant salaries paid to officers made insurer insolvent); same: *Caminetti v. Guaranty Union Life Ins. Co.*, 52 Cal. App. 2d 330, 126 P. 2d 159 (1942).

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The Federal Judiciary Announcement has been received of the appointment of Honorable Sterry R. Waterman, St. Johnsbury, Vermont, to the U. S. Court of Appeals, Second Circuit. Judge Waterman has been a valued member of the Federation for years and has been precluded from attending our various Conferences because of his responsibilities in the National Conference of Commissioners on Uniform State Laws, which group always meets the week prior to the American Bar Association. However, in various ways, he has demonstrated his interest in us and his letter of resignation makes such comment and extends his best wishes for our success and a desire to continue to receive the Quarterly because of its value. We congratulate Judge Waterman upon his appointment and feel that it is a distinct privilege for the distinguished Court of which he is now a member to have the benefit of his legal acumen.